The Central Law Journal.

SAINT LOUIS, AUGUST 31, 1877.

CURRENT TOPICS.

By the inability of the printers to read bad handwriting, our types last week, speaking of the new rules of the Supreme Court of Missouri, said, "The court may *examine* the appeal or writ of error and *continue* the case at the cost of the party in *judgment*." It should have read, The court may *dismiss* the appeal or writ of error, or continue the case at the cost of the party in *default*.

One of the humbugs of the American system is that a state is a "sovereign," and hence can not be sued except with its own consent, and then only in the particular tribunal and in the particular manner pointed out in the constitutional ordinance or legislative act giving that consent. The doctrine has come to amount to this: that these petty sovereignties may contract debts and then repudiate them at will, and there is no power in the law to compel payment. This unreasonable immunity enabled Mississippi to repudiate its debt before the war. This bad example was followed by Minnesota; and now Georgia, with some excuse in morals, though none in law, comes in to complete a trio disgraceful to the American name. We are glad to see as sensible a publication as the *Albany Law Journal* expressing the same view of this subject which we entertain. That journal says: "It would be better, as we look at it, to have all disputes between the State and individuals submitted to the arbitrament of the ordinary courts. There would be no more danger to the interests of the state in such a course than in the ones now in vogue, and private rights would be much better protected. A requirement of security for costs as a condition precedent to prosecuting a claim against the state would cut off vexatious and speculative litigation."

Lord Justice Christian, of the Irish Court of Appeals, to whom we alluded in these columns last week, has succeeded in getting a new controversy on his hands, this time with the House of Lords. It seems that the learned Lord Justice has fared badly in that body in several cases appealed from his decision, but especially so in O'Rorke v. Bolingbroke. According to the London *Times*, Lord Hatherley, in delivering his judgment in that case, "expressed his great regret that in a case where the sum involved was so small, such enormous costs for litigation should have been incurred, but said that after the strong expressions used by Mr. Justice Christian against the appellant—which appeared to him to be wholly unsupported by the evidence—the appellant was bound, in defence of his character, to bring this appeal before their lordships." And Lord Blackburn, in expressing his opinion (with which Lord O'Hagan and Lord Gordon concurred), said that "he should not have come to this conclusion if he thought that any material parts of the eloquent denunciations of the appellant's conduct contained in the judgment of Lord Justice Christian were really based upon facts proved by evidence. The Lord Justice seemed, however, to have forgotten that it was of the essence of justice not to decide against any one on grounds which were not charged against him, and as to which he had not had an opportunity of offering explanations or of calling evidence. He thought it was only fair to Mr. O'Rorke to point out that those imputations of actual fraud were not made by the Lord Chancellor of Ireland, and were, he believed, in the opinion of every noble lord who heard the argument, not justified." These animadversions induced the Lord Justice to write a letter to the *Times*, in which, while bowing to the decision of the court of last resort as the undoubted law, he defends himself at some length against the censure of his judicial conduct contained in the judgment of Lord Blackburn, and concludes by saying: "While accepting unreservedly the authority of the final decision, I can not admit that I need a lecture from my Lord Blackburn as to what is 'of the essence of justice.'" We are not sure that Lord Christian has not in this instance been unjustly blamed—if the facts which he states be true, he has been—but we hope it will not be "recorded for a precedent" that, when a judge deems himself unjustly blamed by an appellate court, he is at liberty to defend himself in the newspapers.

The National Board of Trade, which has just held its annual session at Milwaukee, adopted the following resolutions condemnatory of the bankrupt law: Resolved that in the opinion of this national board of trade the existing bankrupt law of our country is unjust in its essential features, and those features are rendered still more unjust and oppressive in the construction put upon them by the courts, and hence ought to be repealed, or, better still, be so altered and amended as to avoid, if possible, the great wrongs that are now perpetrated under its sanction. We say unjust, because it operates, first, as a premium upon fraud, by making it in the interest of debtors to offer low terms of composition, thereby making to themselves more money, or, rather, retaining others' money not belonging to them, than they could acquire by their labor, and with a due sense of integrity. 2. Because it places the honest merchant at the mercy of the dishonest merchant by a shameless and reckless disregard of obligations, knowing that relief can be had for all indebtedness and dishonesty, in the bankrupt act. 3. That in this regard it demoralizes business, destroys commercial integrity, impairs confidence, and tends to destroy the credit upon which our whole commercial fabric rests, and thus operates as much to the injury of honest enterprise needing aid, as to the injury of the unfortunate and betrayed creditor. 4. That the law is not uniform in its operations, as required by the constitution, but has

thirty-nine applications, corresponding to the number of states in the Union, and thus great injustice arises to creditors, and gives debtors rights in one state, denied to those living in other states. Debtors and creditors should stand alike in all states of the Union under the operations of a national law. 5. That the judicial constructions put upon priority or unsecured liens and confessions of judgment, operate with the greatest hardship upon unsuspecting creditors, compelling them to give credits in the dark and lose their credits by attacks in ambush confirmed under the solemn sanctions of law. 6. That the composition feature of the law is its most odious feature, opening the door to the most shameless frauds and destroying the very foundations of that confidence on which all commercial credits subsist. Resolved that a special committee of seven be appointed, of which the president of this national board shall be chairman, whose duty it shall be to devise such changes of the bankrupt law as, while they secure the just ends sought in such relief laws, shall, at the same time, avoid, if that be possible, the evils herein pointed out and such other evils as shall be found to exist in said law, and present the same to Congress at the next regular session, and urge upon that body their adoption.

ENGLISH AND AMERICAN LAW.

II.—REFORMS IN CRIMINAL PROCEDURE AND IN EVIDENCE.

I may now refer to several important distinctions between the laws in America and England, respectively, in regard to rules of evidence, and I shall begin with the question of criminal procedure.

The treatment to which accused persons were, from a very early period, subjected in England was not creditable, and the reforms achieved from time to time, conceding only a reasonable measure of justice to prisoners, have been very gradual, and in some instances have met with unreasonable opposition. I need scarcely remind you of the time when counsel for a prisoner accused of felony was not allowed to address the jury on his behalf, although such a right was granted to one charged with treason or misdemeanor. An agitation for a reform in this branch of the law began in 1824, but for a long time met with considerable opposition, especially from Lord Lyndhurst. The desired change was most strenuously supported by Lords Brougham and Denman and Sir J. MacIntosh, and also at a later period by Lord Campbell. However, it was not until the year 1836 that the law was amended. Lord Lyndhurst ultimately withdrew his opposition, out of deference to the opinion of Sir Michael Foster. Messrs. George Lamb and Ewart are, however, entitled to as much credit for this amendment as any of the others whose names I have mentioned. It is a fundamental principle of the American law that a prisoner may may be defended by counsel. By the Californian penal code a pauper prisoner is entitled to have counsel assigned him without any fee. In some places where counsel, at the request of the court, defends such a prisoner, he is entitled to claim remuneration by virtue of statute law. The legal profession will, it is to be hoped, ever be willing to render assistance gratis to a prisoner in destitute circumstances, more especially when the offense with which he is charged is one of a grave character. Yet there is no reason why the defense of such a prisoner should be left even to the sympathy of lawyers, one or more of whom should be appointed by the judge of the district, or by the legal profession therein, to defend persons accused of crime, and who are unable to command professional assistance, the counsel defending being entitled to be paid by the government reasonable remuneration. Not only so, but a prisoner should be furnished, at least seven days before the trial, with a copy of the indictment intended to be laid before the grand jury, and also, gratis, with a copy of the depositions. In civil proceedings ample safeguards exist against a defendant being suddenly called on to defend a claim, with the nature of which he may be unacquainted. How much more important is it that in criminal proceedings an accused person should not be taken by surprise, by being required to answer probably an abstruse indictment, the preparation of which may have taxed the legal knowledge of the prosecuting counsel. Moreover, a prisoner should have compulsory process without charge for the attendance of witnesses on his behalf. No opportunity should be allowed to haggle with prisoners whose circumstances may be doubtful regarding payment of fees for a copy of the depositions or for a subpœna. In California the state even makes an allowance to cover the expenses of witnesses called for the prisoner.

I have for a long time been strongly impressed with the idea that a prisoner should be entitled to give evidence on his own behalf, in accordance with the maxim "*audi alteram partem.*" In several of the states a prisoner charged with crime is entitled to give such evidence. The law, which was for some time watched with interest and misgiving, is now regarded in the states in which it is in force with the greatest favor, and there is apparently a growing tendency amongst the Americans to extend the benefit of this provision.

I hope that the New Zealand Legislature will at no distant date abolish the unjust law which prevails here, by which a prisoner is sometimes condemned practically unheard. In after years our posterity will be more astonished at the present law, than we feel surprised at the objectionable and unjust rules of evidence which have from time to time prevailed in England in regard to the trial of prisoners. At one time a prisoner was not allowed to call any witnesses at all, as such a proceeding was calculated to reflect on the evidence brought forward by the crown. This rule assumed what was unfortunately not always the fact—namely, that the crown was desirous of having simple justice done, and that its officers had procured all the

evidence obtainable, for, as well as against, the accused. Afterwards a prisoner was allowed to call witnesses on his own behalf, but they were not sworn, and their statements were not only looked on with suspicion, but doubtless in many instances with absolute distrust.

When public opinion could tolerate this unjust practice no longer, a statute was passed in the first year of the reign of Queen Anne, whereby it was enacted that "in all cases of treason and felony, witnesses for the prisoner shall be examined upon oath in like manner as the witnesses against him." This was undoubtedly an alteration in the right direction. It is somewhat remarkable, however, that, although up to this time courts excluded evidence for the prisoner, judges were not wanting who endeavored to entrap the accused by asking him ambiguous and improper questions. A notable instance of this occurred during the trial of the Duke of Norfolk in 1572. There are certain exceptions in the English law to the rule which I am now considering—namely, in cases of affiliation, and in certain prosecutions under the licensing law. Moreover, by an act of the Imperial Parliament, passed last year, amending the merchant shipping act, a further innovation was made. Under this act it is a misdemeanor for the owner of a vessel to allow it to proceed to sea in an unseaworthy condition, and the onus of showing that the vessel is seaworthy is thrown on the accused, who, however, is expressly allowed to give evidence in the same manner as any other witness. Our own act of last session on this subject, although somewhat qualified in its terms, has worked very satisfactorily.

It was at one time doubted in America, whether the fact of a prisoner entitled to do so, not giving evidence, was a circumstance on which the prosecuting counsel was justified in commenting to the jury. For a time conflicting decisions were given by the judges, but the law may be taken as settled, that no inference unfavorable to the prisoner can be drawn, should he decline to avail himself of this privilege. What is a privilege? Cleary a right of which a person may in his own discretion avail himself. Should a prisoner not elect to do so, whether acting under the advice of counsel or not, no unfavorable comment or inference is allowable. The statute in Wisconsin expressly provides that a prisoner may give evidence for himself at his own request, but his neglect or refusal to testify shall create no presumption against him. And the statute of Minnesota enacts that no comment on such neglect either by court or counsel shall be allowed. If the accused begin to give evidence, he may decline at any step to proceed further, and, of course, like any ordinary witness, he may refuse to say anything which might tend to criminate himself. As a further illustration of the unfairness of the law in force here, it may be mentioned that the deposition of a witness for the crown, examined before the committing justices, may be given in evidence on the trial against the prisoner, if the witness is dead, out of the colony, or too ill to travel. However, the deposition of a witness examined before such justices is admissible for the prisoner—that is, against the crown, only if the witness is dead. Should he leave the colony, or be too unwell to attend the trial, his evidence is excluded. Why should this difference exist? It may be urged that a prisoner might induce a witness to leave the colony or feign illness. Is this likely? Is it not a fact that such a witness is certain to be cross-examined in the lower court by an experienced person, whilst in many instances the witnesses for the prosecution are frequently not cross-examined with any rigor, and sometimes scarcely at all, by the accused. In Queensland, where the justices certify that the witness is unable to attend the trial, his deposition may be read, and the evidence of a witness about to quit the colony may be taken by consent of the crown and prisoner, *de bene esse*.

The reforms in the law of evidence, even in civil cases, have been very gradual. The rule which formerly excluded the evidence of persons having any legal interest in the subject-matter in dispute, although maintained from a praiseworthy motive, was found impracticable. Amongst the Romans the rule was more strict, excluding near relatives; and a son was unable to give evidence for his ather, or *vice versa*.

It was not until the year 1843 that Lord Denman's Act was passed removing the disability on the ground of crime or interest, except in actions of ejectment. This qualification was abolished by Lord Brougham's Act of 1851. By this act parties to the action were made admissible witnesses, and indeed, became compellable to give evidence if required to do so. By the Amendment Act of 1853 (Lord Brougham's) husbands and wives became admissible as witnesses for or against each other, except in cases of adultery and criminal proceedings; but, on the ground of public policy, communications between such persons, made during marriage, were protected, and are, no doubt, likely to continue so. I observe that by the Indian Evidence Act, 1872, the husband or wife of a prisoner can give evidence for or against the accused.

Considering the implicit confidence which a client is frequently called upon to repose in his legal adviser, it is a well-established rule that the latter is not at liberty to divulge any information which may be communicated to him in his professional capacity. No such privilege, however, exists between a medical practitioner and his patient, nor between a clergyman and a member of his congregation. Such a privilege was very strongly insisted on in the case of Regina v. Hay, 2 F. & F. 2, in which the prisoner was charged with stealing a watch. One of the witnesses called was a priest, and it appeared that the prisoner was a member of his church. The priest was asked from whom he got the watch, but he declined to answer the question, on the alleged ground that he was not at liberty to disclose any information which he acquired from a member of his church, and added that if he did answer the question, his suspension for life would

follow. Mr. Justice Hill, however, adjudged him guilty of contempt, and he was removed in custody. This case certainly shows how rigidly the rule against privilege may be enforced. The policy of the law, so far as relates to admissions made to medical men and clergymen, may be open to question. It is not difficult to conceive circumstances under which, if evidence of such admissions were insisted on, great injustice would be the result. In the states of California, Minnesota, Missouri, Nevada and Kansas, communications made by a patient to his physician whilst attending him professionally, and confessions made by any person to his or her clergymen or priest professionally—that is, in accordance with the rules of the denomination to which the parties belong—are privileged. Indeed, in some of the states, the privilege extends to statements made to a public officer in his official capacity.

I may here refer to a reform which might very properly be introduced in England as well as here. Under the Indian Evidence Act, to which I have referred, no confession made to a police officer can be proved against a person accused of any offense, and no confession made by a prisoner whilst in custody is to be given in evidence unless made in the presence of a magistrate.

A law prevails in several of the states, which is well worthy of consideration. In Tennessee, where the opposite parties are executors or administrators, evidence can not be given against them of any statement made by the testator to the opposite party, unless called upon to do so by them or by the court. The principle of this law is in force in nearly all the states, although the language of the various statutes is somewhat different. The rule is general in some of the states, and extends to guardians, trustees, and others occupying a fiduciary position. In New Hampshire, if the executor gives evidence, or if the court is satisfied that injustice would be done, the opposite party may testify. It is not necessary to say more on this subject than merely to observe that, under the present law, evidence given of conversations with a deceased person, or a person unable to give evidence, such as a lunatic, may place an executor or guardian at a serious disadvantage. There is much to be said in support of the opinion of Lord Brougham, who advocated an extension of the Statute of Frauds, and the adoption of the principle of the French law, by which all contracts for sums above a certain amount must be in writing. In his opinson, considering the progress of education, there was little excuse for contracts not being in writing.

In some parts of America, executors or administrators can require a creditor to verify his debt by a declaration* before the latter is entitled to commence an action. This is certainly a reasonable provision, as they have frequently to take the mere word of a creditor for the existence of a debt, with the alternative of being sued. By the law in nearly all the American states, the incompetency of a witness arising from his unbelief is removed, and such unbelief affects his credibility only. In Michigan, a witness can not be questioned touching his religious belief, and in Georgia it has been decided that a witness can not be asked whether he believes in Christ as the Saviour.

The tendency of the English judges for many years has been to relax the rule which relates to the incompetency of witnesses, and to allow any special circumstances touching their belief or character to affect their credibility only. This principle, so far as religious belief is concerned, has been carried into practical effect by recent legislation. Under the Evidence Act (§ 118), all persons are competent witnesses, unless the court is satisfied that they are prevented understanding questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

In some of the states, such as Mississippi, persons who have been convicted of perjury or subornation of perjury are absolutely incompetent as witnesses, and in Tennessee persons who have been convicted of felony, and who have not been pardoned, are not admissible as witnesses. Provisions of this kind, I think, are open to objection, and the fact that a person has been convicted of an offense should merely affect his credibility.

Whilst on the question of evidence, it may not be out of place to refer to the rule which prevails with us in regard to proving deeds. In order to prove a deed requiring attestation, it is necessary to call the attesting witness, if within the jurisdiction of the court. This law, when strictly enforced, is frequently attended with great inconvenience as well as much expense, and the calling of the witness to prove his signature is nearly always an idle ceremony. The rule which prevails in Scotland might be beneficially introduced here. There, a deed appearing, *ex facie*, to be complete, and to have been duly executed, is admitted without proof, it being what is technically called probative. Indeed, by section 38 of the Conveyancing (Scotland) Act, 1874, a deed is still probative, although the testing clause—now of less importance than formerly—does not furnish the particulars as to execution previously required, and, where a deed is improbative, a special mode of proof may be resorted to under section 39 of the act. If such a law be considered objectionable, it might be modified by admitting only deeds attested by certain persons, such as justices of the peace, or solicitors. However, I see no objection to the rule in force in Scotland.

In Queensland, under the Evidence and Discovery Act of 1867, a witness to a deed may prove its execution by a declaration on oath, but the party intending so to prove the deed must give notice to the other side, before the trial, of his intention to do so.

[CONCLUDED NEXT WEEK.]

Quære, by an *affidavit*?—ED. CENT. L. J.

JUDGE DILLON and daughter narrowly escaped death in a railroad accident on Tuesday night, on the Chicago, Rock Island & Pacific Railroad, near Des Moines, Iowa.

REPLEVIN FROM AN EXECUTOR.

EBERSTEIN v. CAMP.

Supreme Court of Michigan, June Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

1. POSSESSION OF SPECIFIC BEQUESTS.—Specific bequests, especially if needed for household or husbandry purposes, should be delivered at once to the legatee, unless likely to be needed to satisfy claims on the estate.

2. RIGHT TO PREVENT ENJOYMENT OF SPECIFIC BEQUESTS.—One object of making specific legacies is to secure their prompt enjoyment by the legatee, and an executor has no right to prevent this unless there is a deficiency of assets.

3. REPLEVIN OF SPECIFIC BEQUESTS.—An executor who has once assented to the holding of a specific legacy by the legatee, can not, arbitrarily resume it, and if he does so, it may be replevied. If necessary to resort to the specific legatee for contribution, the Michigan Statute (2 Comp. L. §§ 4355-6), has furnished the proper means.

4. ASSENT OF EXECUTOR TO POSSESSION OF LEGACY.—Assent is presumed from leaving a legacy in the legatee's possession.

CAMPBELL, J., delivered the opinion of the court:

In this case Camp replevied from Eberstein a reaper and horse-rake, which had belonged to Henry Camp, father of Freeman. Henry Camp died in January, 1873, leaving a will which was proven immediately by Eberstein as executor, and commissioners were appointed in March, 1873, who reported debts in September to the amount of $849.65. The uncontradicted testimony showed that Eberstein had sold personal property to the amount of over $1,300, with a part of which he paid some debts, and as to the balance he said he could not tell what had become of it. In December, 1874, he took away from Freeman Camp the articles in question which had been specifically bequeathed to the latter by his father's will, whereby it was expressly directed that the debts should be paid out of his personal property not specifically bequeathed. Up to that time he had left these articles, with the other specific bequests in Freeman's favor, in the latter's possession.

These facts being established and not disputed, several questions arose on the trial, and some of them came up for review. The judgment below was in favor of Freeman Camp. Upon the part of the plaintiff below there was evidence introduced by his own oath of a gift made to him by his father before death. The testimony as set forth appears to relate to a future and not a present gift of these particular articles, and did not tend to show either a gift *in presenti* or *causa mortis*. No doubt it referred to the testamentary disposition afterwards made, and, so far as this gift was concerned, it was erroneous to consider it.

But the question still remains, whether, as the case was presented, the jury could lawfully have found a verdict for the defendant below.

Upon so much of the case as related to the rights of an executor, the court charged expressly that, if the property was taken by Eberstein in good faith as executor, and if it was needed, or if there was any probability of its being needed for the purpose of paying debts, the taking would be justifiable.

Our compiled laws, in conformity with the common law, authorize specific legatees, with the consent of the executor, to possess their legacies before settlement; and when they do so they are liable to contribution, in case any claim arises chargeable on their bequests. C. L. § 4355. The statute does not in such case authorize the executor to seize the specific legacy of any one and turn him over to proceedings for contribution against the rest, nor until such liability is apportioned by the court. §§ 4355, 4356. That an executor may originally retain possession unless otherwise ordered by the probate court under § 4353, seems to be still the rule as at common law. But propriety would dictate that when there is no probability of any occasion for the contrary, specific legacies necessary for household or husbandry purposes should be left to the legatees, as was done in this case.

It is well settled at common law, as well as in equity, that an executor can not arbitrarily revoke his assent (2 Redfield on Wills, 563, and note), and that an action at law will lie against him thereafter to recover the specific bequests. Doe v. Guy, 3 East R., 120; Atkins v. Hill, 1 Cowp. 284. It was said by Lord Mansfield in the latter case, that if an executor has assets he has no right to withhold his assent, and that equity will compel him to give it. The object of giving specific bequests is held to be to expedite their payment, and the courts have so acted. In Fontaine v. Tyler, 9 Price, 94, it was held such a legacy of stock was due at once on testator's death; and the authorities are settled that the right to dividends and the liability to assessments begins at that time. Ib.; 2 Redfield on Wills, 469, 583, 566, and cases cited.

The enforcement in equity after assent is never refused when necessary, and is in accordance with what was said by Lord Mansfield. In Chaworth v. Beech, 4 Ves. 555, where executors retained a security specifically bequeathed, without any necessity, as assets, and it depreciated, the legatee was held entitled to have the loss made good, as of its original value. The ground of this decision as stated, and as afterwards referred to in Innes v. Johnston, in the same volume, on page 573, was that the executor "should have put it in the hands of the legatee." And in Kirby v. Potter, 4 Ves. 748, 751, it is said by the Master of the Rolls, "Every one knows, a specific legacy of a *corpus* passes from the death of the testator. It vests immediately from that time." In Northey v. Northey, 2 Atkyns, 77, it was held that in equity no assent was necessary to hold the executor liable on a specific legacy, and that the rule requiring it as a ground of action only applied at law. In Williams v. Lee, 3 Atkyns, 223, it was declared that trover would lie against him when he had assented. And in 1 Ves. 94, it is held, in conformity with the more modern decisions, that assent may be compelled if unreasonably refused. Com. Dig. "Chancery," 3 G. 4; "Administration," C. 3. Assent is presumed where the legatee is left in possession. 2 Redfield on Wills, 562, and notes. This subject was discussed in the recent case of Proctor v. Robinson, January Term, 1877.

The facts which were undisputed showed not only assent, but, what is also important, had no tendency to show any ground for withholding it. The court below, nevertheless, held that good faith in the executor would justify his taking, and in this certainty took extreme grounds in his favor.

In our opinion there was no testimony in the case which could have authorized a verdict—as matter o law—in favor of the plaintiff in error, and the judgment can not be disturbed on account of any rulings which could not have possibly changed the result; and it should be affirmed with costs.

WALTER CLARK, Esq., of Raleigh, N. C., a frequent contributor to this Journal, has published "an index of the cases decided in the Supreme Court of North Carolina which have been overruled, modified, limited, explained, denied, doubted and distinquished, to which is appended a list of abbreviations used in quoting American, English, Irish and Scotch Reports."

EXECUTION SALES—INADEQUACY.

JONES v. TOWNSEND.

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOS. J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED,
} Associate Justices.

1. EXECUTION SALE—INADEQUACY—REDEMPTION.—A sale of land under execution, will not, in Tennessee, be set aside on account of gross inadequacy of price, after the statutory period of two years for redemption by the debtor has expired, though the debtor has died within those two years. The right of redemption within two years furnishes the sole right of relief to the debtor or his heirs.

2. EXECUTION SALE — INADEQUACY — SALE IN GROSS—SUBDIVISION.—Such sale is not invalidated because the sheriff sold in gross, lands susceptible of convenient division, when included in one general description. The statutory privilege to the debtor of having the land subdivided at the sale, furnishes the sole remedy in this respect to the debtor or his heirs.

DEADERICK, C. J., delivered the opinion of the court:

The complainants in the original bill are the widow and heirs and heirs-at-law of W. E. Jones, deceased, and file their bill in the chancery court at Memphis, asserting their title to, and to stay waste upon, a tract of 640 acres of land in Shelby County.

It appears that W. E. Jones purchased, at a sale under proceedings by the Chancery Court at Nashville, on an execution issued therefrom, the tract of land in question, in 1865, in the suit of the Ohio Life Insurance and Trust Company v. Daniel B. Turner, the then owner of the land; that he took a deed from the sheriff for said tract of land, and entered upon the possession thereof some time during the year 1865. It further appears that in June, 1866, Townsend obtained a judgment against Jones in the Circuit Court of Shelby County for about $1,200, and that execution thereon was issued, and levied upon said tract of land, as the property of said Jones, and was sold on 12th September, 1866, Townsend becoming the purchaser at $1,242.97. He obtained a deed from the sheriff. The time allowed by law for redemption having expired, and Jones having died after the sale, and before the time of redemption expired, and no one offering to redeem, Townsend entered into possession of part of the land. After the purchase by Townsend, dower was assigned to Annie L., the widow of said W. E. Jones, and Townsend, since the filing of the original bill, bought her dower interest in the land. The original bill sought to set aside the purchase by Townsend, upon the ground alleged, that the sheriff had not given Jones the twenty days' notice required by law. The amended bill, insisting upon this ground, assigns and charges several other reasons why the sale to Townsend is invalid, and should be set aside.

1. Because, on 20th November, 1865, Wm. E. Jones conveyed to Wm. H. Stovall 100 acres of said tract, in trust to secure Wright and McKissick against a certain liability they had assumed for him, and this 100 acres was not reconveyed to Jones until 2d October, 1866, and after the sale to Townsend, and it is insisted that this 100 acres could not be levied upon or sold by execution. * * * * * * *

4. It is further charged that the sale was void, because the land was divided by natural and artificial lines into several distinct lots, any one of which was of value sufficient to more than satisfy the judgment in favor of defendant, and that the whole tract was worth $65,000, and that it was the duty of the sheriff to sell no more than was sufficient to satisfy the debt and costs, amounting to about $1,242. His honor, the special chancellor, decreed that complainants were entitled to be relieved of the great hardship of losing the tract of land worth from $30,000 to $50,000, for the grossly inadequate sum of $1,242.97, bid for it by Townsend, the purchaser, and that it was naturally susceptible of division, and should have been divided. But the chancellor was of opinion, and so decreed, that Townsend was entitled to his debt, interest and costs, and to have the same declared a lien upon the land, and that complainants should tender the same in court, and allowed them thirty days within which to file an amended bill to bring the money due said Townsend into court, and that upon filing said amended bill and making said tender, complainants' right to redeem shall become fixed, and their right to said land established. If the complainants should not elect to amend their bill, and tender the money into court within thirty days from the date of the decree, then the chancellor directed that the bill and cross-bill stand dismissed without prejudice to either party, each party paying his own costs. This decree was rendered on 18th July, 1871, and no appeal was prosecuted therefrom. And on the 14th August, 1871, complainants filed their amended bill, averring that they had made a tender of the amount due, personally, to Townsend, and that he had refused to accept it, and bringing the money into court. Townsend answered the amended bill 18th November, 1871, raising some questions as to the regularity and sufficiency of the alleged tender, and charging a champertous arrangement or contract by complainants with others. Upon these issues depositions were taken, and on 5th March, 1872, a final decree was rendered adjudging that the tender had been made to Townsend of the money due him, and had been brought into court for his benefit, and that complainants were entitled to be invested with the title to said land, and to writs of possession thereof, except the dower tract, and decreed accordingly, and directed an account for waste and permanent improvements, etc. And defendant, Townsend, appealed to this court. The deposition of the deputy sheriff, who made the sale to Townsend, is taken, and satisfactorily establishes that the twenty days' notice required by statute was given by him personally to Jones.

The conveyance of one hundred acres, in trust, to Stovall, made 20th November, 1865, was made to indemnify Wright & McKisick against liability as acceptors of an accommodation bill, drawn on them by Jones, at ninety days. The bill was not presented or protested at maturity, and the trust deed stipulates that Wright & McKissick should select out of the six hundred and forty acres, from any portion thereof, except the houses and cleared land, one hundred acres, and have the same surveyed, and a plat thereof, with the metes and bounds furnished to the said William H. Stovall; and when the said one hundred acres are so selected, ascertained and set apart, the said William H. Stovall shall hold to him, and his heirs, etc.; and provides, that upon paying said bill and saving his acceptors harmless, the deed shall be null and void. No survey was made, or metes or bounds furnished the trustee, nor did the beneficiaries ever select any hundred acres out of the six hundred and forty acres; and it can not be said that any particular hundred acres ever vested in the trustee; on the contrary, by the terms of the deed, the trustee was to hold to him and his heirs only when the hundred acres was selected, surveyed, set apart, etc., and until that was done, the effect of the deed was simply to confer on the trustee the power to hold, etc., when the selection, etc., was made. * * * The special chancellor held in con-

formity to this opinion upon the several questions hereinbefore discussed, and we are of opinion that his holding was correct. But the chancellor further held that the land being susceptible, by well-defined natural and artificial boundaries, of division, that it was the duty of the sheriff to have sold it in lots as so divided, and that complainants were entitled to be relieved of the great hardship of losing the land, worth $30,000 to $50,000, for the grossly inadequate sum of $1,242.97, bid for it by Townsend. From said holding, notwithstanding the apparent hardship of the case, we feel constrained to differ. The case of Tiernan v. Wilson, 6 Johns. Ch. 411, is cited, and relied upon as sustaining the holding of the chancellor. In that case, the sheriff sold together two distinct lots, upon an execution for $10.25, for $13.00. The lots were worth $780. The sale was set aside as fraudulent and void. In the opinion by the learned chancellor it is said: "The proposition is not to be disputed, that the sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected can be conveniently and reasonably detached from the residue of the property and sold separately." Whether the proposition was laid down in view of any statutory provision, does not appear from the opinion. But in view of the provisions of our statutes, we are of opinion that the rule can have no application in Tennessee, so far as it is understood as requiring the sheriff to separate for sale a portion of an entire tract. This court has held that it is a fraud upon the right of redemption to sell together two or more distinct lots of land, and that such sale is void. Winters v. Burford, 6 Cold. 328. But Code, secs. 2154 and 3043, give the right to the defendant in the execution, to divide his tract of land, at any time before ten o'clock A. M. of the day of sale, by delivering a plan of such division, subscribed by him and in such case it is the duty of the sheriff to sell according to such plan. If no such plan is furnished, it is the duty of the sheriff to sell without division. He has no right, much less is it his duty, to divide the lands, no matter what the amount of the debt or the value of the land levied upon. The debtor's security against the sacrifice of his property depends upon his vigilance in availing himself of his right of redemption, which the law gives him for the period of two years after the execution sale.

It is further insisted, that Townsend having failed to prosecute his appeal, when the decree of July 18, 1871, was pronounced, can not upon his appeal in March, 1872, now inquire into the questions determined by the decree of July 18, 1871. While we hold that the defendant, Townsend, might, by leave of the court, have appealed from that decree, he was not bound to do so. That decree had directed that if certain things were not done within thirty days by complainants, their bill should be dismissed, and the defendant might wait to see and contest the fact of performance of the acts required to be done. The decree of 1871 did declare complainants' right to redeem, and adjudge the costs of the cause; but the decree of March Term, 1872, divested and vested title, and determined finally the respective rights of the parties, and was the last, the final decree in the cause, from which either party had the right to appeal, and the appeal by Townsend brought the whole case, and all the questions involved in it, to this court for revision.

The chancellor's decree, giving the complainants the right to redeem, must be reversed, and complainants' bill be dismissed with costs.

NOTE.—This case well illustrates the exceeding hardship and severity of the rule in Tennessee which governs execution sales, and the vestiture of title thereby, and the equity of redemption pertaining thereto. Though claiming relief in a court of equity, the plaintiffs were here remitted to their simple rights at law, and held bound by all the limitations with which those legal rights are surrounded. The exceeding inadequacy of consideration was held wholly immaterial, because it was a case of a sheriff's sale on execution, and the legal rights of the parties were limited, beyond power of judicial extension, to a redemption within two years, and to a subdivision by the sheriff, on the day of sale, only on the express demand of the judgment debtor. Thompson and Steger's Code, sections 2124, 2154, 3043. We believe no preceding Tennessee case has laid down these rules with equal simplicity and severity.

1. In Tiernan v. Wilson, 6 Johns. Ch. R. 411, the sheriff's sale was set aside, partly on the ground of inadequacy of the consideration, and partly on that of one single sale of two separate lots. The extract from this opinion, given in the principal case, shows that it was there recognized as a rule of positive equity, if not of law, that "a sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand, provided the part selected *can be conveniently and reasonably* detached from the residue of the property, and sold separately." No statutory provisions are cited as leading in any manner to this conclusion. It would seem from other New York cases to be there sustained outside of statutory authority. Thus, in Jackson v. Newton, 18 Johns. 362, a sheriff's sale of several distinct parcels of land, in several possession, but covered under one general description, was criticised as objectionable, and "not to be countenanced or tolerated." And in Henson v. Dygert, 8 Johns. 333, it is said: "The proper course, both on sales of real and personal property, is to sell only so much of the property charged as will probably satisfy the execution, and which can conveniently and reasonably be sold separately. A party who sells under a power is not bound to sell, at once, all the property bound by the power, and in many cases it would be an act of great oppression to do it."

But the Tennessee statutes, dating from 1799, and providing for a division of the land by the sheriff at the day of sale, and only on the demand of the owner, are strong enough to prevent the application of any such equitable rule. Though the land be fully susceptible of convenient division, it may, when included in one general description, be sold in a body, unless this statutory privilege of division has been specifically exercised.

2. The subject of gross inadequacy of consideration receives some consideration in the above-named case of Tiernan v. Wilson. To the general rule that no relief can be granted to suffering parties on this ground alone, there are some well-recognized exceptions. Chancellor Kent held that this rule applies only where the parties interested have stood *upon equal ground*, and have dealt with each other at equal advantage. Osgood v. Franklin, 2 Johns. Ch., 23. And the text-writers say that the rule never applies in strictness where there are persons in distress or ignorance, or not competent to protect their own interests. Hill on Trustees, pp. 152, 153.

But mere inadequacy has been held sufficient ground for refusing a decree for specific performance. Seymour v. Delancey, 6 Johns. Ch. 222. And *gross* inadequacy alone, when so gross as to shock the conscience, has been held sufficient ground to avoid a contract. Eyre v. Potter, 15 How. 60; Murch v. Smith, 15 Texas, 219. A sale *in invitum* for taxes was, in like manner, set aside, without any actual fraud proven, in Stead's Exrs. v. Course, 4 Cranch, 403.

In Tennessee, it will be seen that the statutory redemption of two years has the most controlling power over all execution sales, when it compels the supreme court to reverse the decree of a chancellor who had considered the case above reported to be a proper one for equitable relief. For that court has gone as far as any in affording relief in cases of voluntary sales and contracts, on the ground alone of inadequacy. In Wright v. Wilson, 2 Yerg. 294, a sale by a trustee was set aside on the ground of gross inadequacy of consideration, it being one tenth of the value, as evidencing fraud; and the authorities were cited and referred to. And inadequacy not gross was, when combined with other suspicious circumstances, sufficient to avoid a sale by a trustee. Coffee v. Ruffin, 4 Cold. 507. Gross inadequacy alone was held sufficient to authorize setting aside a voluntary assignment of a legacy, in Deaderick v. Watkins, 8 Hum. 520. And in the case of Hansard v. Sharp, Thompson's Tenn. cases, 73, the gross and glaring inadequacy of the consideration was held alone sufficient to import fraud, and to set aside a contract of sale. P.

MARSHALLING OF TESTATOR'S ASSETS.

FARNUM v. BASCOM.

Supreme Judicial Court of Massachusetts, January Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" CHARLES DEVENS, JR.,
" OTIS P. LORD,
} Associate Justices.

1. LEGACIES — GENERAL AND SPECIFIC.—Where there are both general and specific legacies and devises, those which are general must first be used for the payment of debts, even if they are thus entirely abated, before resort can be had to those which are specific.

2. GENERAL LEGACY.—Where the intent is to bequeath a certain sum, and the circumstance that it is then out on mortgage or any other security is incidental merely, and does not constitute an ingredient in the gift, the legacy is general.

3. SPECIFIC LEGACY.—But if the gift be of the sum due upon a mortgage of particular premises, or upon a certain note described, or all the money due on the bond of A. B., or standing to the testator's credit in a certain bank, or a particular security described, the legacy is specific.

4. DEVISES OF REAL ESTATE.—The English rule that all devises of real estate are specific, probably never obtained in this state, and certainly has no present existence here.

5. SPECIFIC DEVISES.—A devise of a life estate in a lot of land with the buildings thereon, particularly described by its situation and as the one occupied by the testatrix, and a devise of the revision of the same, as well as a legacy of a mortgage deed, note and debt, are specific.

6. PREFERENCE PURCHSERS.—When legacies or devises must fail to some extent, the court will consider the situation of the several beneficiaries, and will accord a preference to those who are not pure beneficiaries, but who, in consideration of the legacy, are to relinquish or have relinquished some important right.

PETITION by Henry Farnum, executor, for the construction of the last will and testament of Rebecca Bascom, by which she gives:

First, her wearing apparel to her sisters, share and share alike.

Second, a certain mortgage-deed made to her by John Foster, for $2,500, on a lot of land with buildings thereon, situated in Boston, together with the mortgage-note and debt thereby secured, to the petitioner in trust to hold and collect the interest as it should become due and payable, to sell and transfer said mortgage and note whenever the petitioner might deem it best to do so; to collect, hold and invest the interest, and pay over one-half of the principal and interest to each of her nephews, W. B. and C. J. Daniels, when they respectively become of age.

Third, all the rest and residue of her personal property to her husband, the defendant, Bascom.

Fourth, the use, improvement and income of a certain lot of land with the buildings thereon, situated in Lowell, to her said husband, to hold for and during his natural life, upon the express condition that he shall pay all taxes thereon and keep the buildings in repair.

Fifth, the revision or remainder of such last mentioned land and buildings and all profit, income and advantage that may result therefrom, from and after the determination of her husband's estate therein, to her neice, A. A. Daniels, her heirs and assigns forever.

The testatrix left no issue, and there were bills outstanding against her estate, amounting to about $300, and a promissory note made by her for about $50, both having been contracted and made by her with reference to her sole and separate property. There were also certain funeral expenses still unpaid, and expenses of administration. There was no rest or residue of personal property as mentioned in the third item, all the property belonging to, and left by her, being her wearing apparel and said mortgage and said land and buildings in Lowell. There were also at the time of her death, taxes due and payable on said last named estate.

The opinion of the court was delivered by DEVENS, J.:

It would seem that the will of the testatrix was made under a misapprehension, in reference to the amount of her property, or that liabilities were afterwards incurred by her not then contemplated. She has left debts, in addition to the funeral expenses and charges of administration. Under the third bequest of the will, "of the rest and residue of her personal property" to her husband, there is nothing which will pass. All the remainder of her property is devised or bequeathed, and she has made no provision for these claims.

Where there are both general and specific legacies and devises, those which are general must first be used for the payment of the debts, even if they are thus entirely abated, before resort can be had to those which are specific. It is the presumed intention of the testator, that the legatee shall receive the specific thing bequeathed. As long as it can be identified among the assets of the testator, he is to have it; and when it can not be found and identified, he has no claim against the estate on that account. It is necessary, therefore, to determine the character of the various legacies and devises made by the testatrix.

That the legacy of the wearing apparel to the sisters of the testatrix is specific, there is no controversy. It is a bequest of specific things belonging to her, intended to be transferred in specie to the legatees.

The second bequest is of a certain mortgage-deed and note for $2,500 to Henry Farnum, in trust, to be paid to two nephews named, half to each, as they respectively come of age.

Where the intent is to bequeath a certain sum, and the circumstance that it is then out on mortgage, or any other security is incidental merely, and does not constitute an ingredient in the gift, the legacy is general. LeGrice v. Finch, 3 Meriv, 50. But if the gift be of a sum due upon a mortgage of particular premises, or upon a certain note described, the legacy is specific. Sidebotham v. Watson, 11 Hare, 170; Guillame v. Adderly, 15 Ves. 384; Chaworth v. Beach, 4 Ves. 555; Junes v. Johnson, 4 Ves. 368; Giddings v. Seward, 16 N. Y. 365. So, if the gift is of the proceeds of a certain mortgage, or all the money due on the bond of A. B., or all the money standing to the testator's credit in a particular bank, such legacies are specific. Giddings v. Seward, *supra*; Stout v. Hart, 2 Halsted, 414; Towle v. Swasey, 106 Mass. 100. When the bequest is not of the sum of money due on a particular security, but of a particular security described, the gift is not less specific, for nothing will fulfil the terms of the bequest but the thing itself.

The legacy we are now considering was of the mortgage-deed, note and debt. The fact that the testatrix mentions the amount due from the promisor is for its convenient identification only. This does not constitute any ingredient in the gift. It would belong to the legatee if it should have been reduced by payment, but there would not be any claim on account of such reduction against the general estate. As long as it can be identified the legatee may have it, but he receives it in the condition in which it is when the gift takes effect by the death of the testatrix. The security was the essential thing. If the money due thereon had been collected and invested in a new form, the legacy would

have been adeemed, as that which was given would have ceased to exist. This legacy is, therefore, to be treated as specific.

The devise of the use and improvement of a certain lot of land for the term of his natural life to the husband of the testatrix was specific. The English rule that all devises of real estate are specific, probably never obtained in this state, and certainly has no present existence here. Blany v. Blany, 1 Cush. 515. There is no occasion to invoke it in this case. The lot of land with the buildings thereon, in which the life estate is given, is particularly described by its situation as the one occupied by the testatrix and her husband. Nothing else will satisfy the terms of the devise. Nor is the devise less specific because it is not the devise of the entire estate. The gift of a term in real estate is not less specific than that of the real estate. Long v. Short, 1 P. Wms. 403; Creed v. Creed, 1 Dru. & War. 415; Page v. Leefingwell, 18 Ves. 413. It is suggested that the use and improvement of a lot is a gift indefinite in amount, dependent on its value after many deductions, and therefore not specific. This is unimportant. All the money which may be in a box described, or which may be to any credit at a certain bank, or which I may recover in a certain action at law, is a specific legacy, although the amount is uncertain. Towle v. Swasey, *supra*; Chase v. Lockerman, 11 Gill & Johns. 185; Gilbraith v. Winter, 10 Ohio, 64.

The devise of the remainder of the real estate to the neice of the testatrix must be held to be specific, for the same reasons which apply to the life estate.

As all the bequests and devises are specific, it is next to be considered how the burden of the debts is to be distributed among them, and whether or not there is any preference between the legatees and devisees as such.

In Hubbell v. Hubbell, 9 Pick. 561, it is put as a query whether in case of a deficiency of assets the devisees are equally liable with the legatees to contribute. The Gen. Sts. c. 92, §§ 29—34 provide, that when any estate real, or personal, is taken from a devise for the payment of debts, all other devisees or legatees are to contribute in proportion to the alue of property received by each.

If the testator, by making a specific devise or bequest, has virtually exempted any devisee or legatee from liability, or required any different appropriation for the payment of his debts, the estate shall be appropriated in conformity with his will. These provisions do not in terms meet the case, where all the bequests and devises are specific; but they sufficiently indicate the intent of the legislature, that there shall be no preference of the real to the personal estate, when recourse must be had to that specifically devised or bequeathed, in order to meet his debts. They must bear the burden proportionally.

Such is the rule of law apart from the statute. The testatrix by her will has indicated her wish that each beneficiary should bave that which was specifically devised or bequeathed. To some extent her bounty must fail; but there is no reason to suppose that, by bestowing upon one realty and the other personalty, she intended to prefer one above the other, and their gifts abate in proportion to their value. In Long v. Short, 1 P. Wms. 403, it was held that specific devisees and legatees were liable, ratably, upon failure of assets for the specialty debts, but not for those by simple contract. As simple contract debts were not then chargeable upon the land, it could not, of course, be called to contribute to them. The same principle has been followed there since the land has become liable for debts. Gervis v. Gervis, 14 Simons, 654; Tombs v. Roch, 2 Colly, 490; Young v. Hazzard, 1 Jon. & Lat. 466. Where a testator charged his lands with payment of debts, it was held that specific devices and legacies stood upon equal footing as to the abatement. Thompson v. Lady Lawly, 2 Bos. & Pul. 210. In Rogers v. Rogers, 1 Paige, 188, it was held that chattels specifically bequeathed must be applied to the payment of a judgment against the testator before a resort could be had to the land; but this case is not in accord with the other American authorities, which adopt what are deemed to be the correct rules, that specific legacies and devises are to bear the burden of the debts ratably, when resort must be had to them. Ogden's Appeal, 11 Penn. St. 72; Hallowell's Estate, 23 Penn. St. 223; Loomis' Appeal, 10 Penn. St. 387; Chase v. Lockman, *ubi supra*.

It remains to be considered whether any reasons appear in this case which show that there should be a preference of one devisee or legatee over the others.

It is suggested that as it is shown that the debts of the testatrix were contracted "with reference to her sole and separate property," we must infer that they were not contracted in reference to her clothing or the mortgage note, but must have been with reference to her real estate, in repairs, etc., and that it is but just that the devisees should pay them. Such an inference would be of quite too uncertain a character to justify any preference in favor of the legatees. There is no legal evidence that they were incurred on account of the realty, as the legatees suggest, and if they were, it would by no means follow that the testatrix intended that the real estate should pay them, to the exclusion of the personal.

A preference is claimed on behalf of the life estate bequeathed to the husband upon more substantial grounds. When legacies or devises must fail to some extent, it is recognized that the court will consider the situation of the several beneficiaries, and will accord a preference to those who are not pure beneficiaries, but who, in consideration of the legacy, are to relinquish or have relinquished some important right. Such legatees or devisees are treated as purchasers, and if there must be an abatement of the legacies, even if their legacies are general, they are not compelled to submit to such abatement, until the general legacies of those who are pure beneficiaries are exhausted. When a legacy is in lieu of dower, or in case of relinquishment of dower, or where, by acceptance of the legacy, the doweress has lost her dower, she is not deemed a pure beneficiary. While the moral obligation to provide for a child is not the less than for a wife, yet, as she has a legal claim upon the estate, and the child has not, she is preferred in her legacy. Davenhill v. Fletcher, Ambl. 244; Heath v. Drudy, 1 Russ. 543; Norcott v. Gordon, 14 Sim. 258; Isenhart v. Brown, 1 Edw. Ch. 411; Pollard v. Pollard, 1 Allen, 490; Towle v. Swasey, 106 Mass. 100.

The rule can not differ when all the legacies are specific, certainly, if that to the widow is specific also. She still takes as a purchaser, and is not to be treated as a beneficiary in marshalling the assets. Even when the will was made the person named was not entitled to dower. It having been made in contemplation of marriage, she was treated as a purchaser, being entitled to dower where the will became operative. Towle v. Swasey, *ubi supra*.

Applying a similar principle to the present case, the husband can not be treated as a pure beneficiary. He is not, indeed, shown to have been a tenant by the courtesy in the wife's real estate, but, by assenting to the will, he relinquished his right to one-half of the personal property. Of this he could not have been deprived by the will of his wife, except with his own assent. Gen. Sts., c. 108, §§ 9, 10. That assent was accompanied by a devise to him of this life estate. He does not occupy a relation to the estate of the testatrix, similar to that of sisters, nephews and nieces, none of

whom had any rights in it. As a purchaser, he is entitled to have the legacies and devises to pure beneficiaries, although specific in their character, first applied to the payment of the debts. It is not important whether that which he is to receive is, or not, an exact equivalent, in value to the right which he relinquished, it is sufficient that the testatrix deemed it proper to treat it as such. Davenhill v. Fletcher, *ubi supra*.

As to the taxes assessed upon the real estate while the testatrix was living, the case does not show whether or by whom they have been paid, nor whether they still constitute a lien upon the estate, and does not so present the facts relating to them, that the court can give an opinion upon the question out of what fund or property they are to be paid.

The result is, therefore, that all the legacies and devises are specific; that there is no preference of the realty as such to the personalty; that all, except the devise to the husband, are to be charged with the payment of debts due, and expenses of administration in proportion to their respective values, and that until they are exhausted no resort is to be had to the life estate of the husband.

DECREE ACCORDINGLY.

BANKRUPT ACT—LIMITATION OF ACTIONS.

WALKER, ASSIGNEE, Etc., v. TOWNER.

United States Circuit Court, Western District of Missouri, April Term, 1877.

Before Hon. John F. DILLON, Circuit Judge.

1. LIMITATION OF SUITS BY ASSIGNEE—R. S. § 5057 CONSTRUED.—A suit by an assignee in bankruptcy to collect debts or claims due to the estate, must be brought within two years from the time when the cause of action accrued to the assignee.

2. SAME—COMMENCEMENT OF SUIT.—Where an assignee filed his petition or declaration in a suit to recover such a debt within two years from the time when his right of action accrued, but gave directions to the clerk not to issue the summons, and such summons was accordingly not issued or served until more than two years from the time the cause of action accrued: *Held*, that the action was barred.

This is an action brought to recover $3,500, as the balance due by defendant upon a subscription by him to the capital stock of the North Missouri Insurance Co., of which the plaintiff is the assignee in bankruptcy. The petition in this case was filed March 20, 1876; but the summons was not issued (by direction of plaintiff's attorney, as stated in the plea of the statute of limitations below mentioned) until November 1, 1876, and was not served until November 2, 1876. The petition alleges that the company was adjudicated a bankrupt November 8, 1873; that the plaintiff was appointed assignee on March 21, 1874, and that on July 3, 1874, the district court, on a petition presented by the assignee, found "that it is necessary, for the purpose of paying the indebtedness of the said company, to collect the whole of its assets, including the unpaid stock," and, thereupon "ordered that the said assignee *proceed forthwith* to collect from the stockholders of said company the full amount due and unpaid on the shares of stock by them respectively held in said company."

The defendant answered. The second and third special defenses set up the statute of *limitations* prescribed in the Bankrupt Act. It is alleged in said defenses that the deed of assignment from the register in bankruptcy to the plaintiff as assignee, was dated March 23, 1874; that the order of the bankruptcy court assessing all stockholders, etc., was made July 3, 1874; that plaintiff's petition in this action was filed herein March 20, 1876; the writ issued November 1, 1876, and service had on defendant November 2, 1876. It is also alleged that service of process was countermanded by plaintiff for an indefinite time, and that plaintiff, of his own accord and without the fault of defendant, forbore to issue process or to prosecute said suit until said issue of process, November 1, 1876.

To this plea of the statute of limitations the plaintiff demurred, and it was on this demurrer that the case was submitted to the court.

N. Myers, for the plaintiff; *Albert Blair*, for the defendant.

DILLON, Circuit Judge:

The plaintiff's petition to recover in this case was filed within two years from the date of the order of the district court to the assignee, to collect the unpaid stock, but by direction of the plaintiff's counsel to the clerk, the writ of summons was not issued until more than two years from the date of said order had elapsed. The effect of this is conceded to be the same as if the petition had not been filed until November 1, 1876, which is more than two years from the time when the assessment or order to collect by the bankruptcy court was made. If, under the second section of the bankrupt act as found in the Revised Statutes, sec. 5057, any suit for the collection of assets by an assignee in bankruptcy is barred by the two years' limitation therein prescribed, then the present action is barred, if the facts set forth in the plea are true.

This is an important question, and it has been thoroughly argued by counsel. Since this case was submitted the same question came before Mr. Justice Miller, in the Kansas circuit, at the June term, 1877, in the case of Payson, assignee, etc., v. Coffin.

The learned justice, after argument and consideration, there held that the two years' limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property. The opinion was orally pronounced, but this conclusion was regarded as the almost necessary result of the language of section 2 of the Bankrupt Act of 1867, particularly the words "but *no suit* at law or in equity shall *in any case* be maintainable by or against such assignee, * * * unless the same be brought within two years from the time the cause of action accrued for or against such assignee," which was not intended to be changed, in substance, by the Revised Statutes, secs. 4979, 5057; and this conclusion was considered to be strongly supported by the views of the supreme court in Lathrop v. Drake, 1 Otto, 566; Claflin v. Houseman, 3 Otto, 130, and Bailey v. Glover, 21 Wall. 342, and by the obvious policy of the Bankrupt Act in requiring speedy settlement of estates in bankruptcy. In Baily v. Glover, *supra*, Mr. Justice Miller, *arguendo*, observed: "To prevent this" [protracted litigation and delays in closing the estate] "as much as possible, Congress has said to the assignee, 'you shall commence *no* suit two years after the cause of action has accrued to you, nor shall you be harrassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up, and your functions discharged, and we close the door to *all litigation* not commenced before it has elapsed.'"

The decision in Payson, assignee, v. Coffin, *supra*, has authoritative force in this circuit, and it is needless to enforce the arguments by which it may be sustained as a sound exposition of the limitation provisions of the Bankrupt Act. It is true that views have been expressed by judges which might lead to a different conclusion, as in Sedgwick v. Casey, 4 Bank. Reg. 496; Smith v. Crawford, 9 *Ib.* 38; *Re* Krogman, 5 *Ib.* 116;

Bachman v. Packard, 7 *Ib.* 353; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176; *Re* Conant, 5 Blatchf. 54; but the weight of judicial opinion is with the judgment of Mr. Justice Miller, in Payson, assignee, v. Coffin: Mitchell v. Great Works Milling Co., 2 Story, 648, 660; Pritchard v. Chandler, 2 Curtis, 488; McLean v. Lafayette Bank, 3 McLean, 185, 188; Norton v. De la Villebeuve, 1 Woods, 168; Miltenberger v. Phillips, 2 Woods, 115; Comegys v. McCord, 11 Ala. 932; Harris v. Collins & Cartwright, 13 Ala. 388; Paulding v. Lee, 20 Ala. 753; Pike v. Lowell, 32 Me. 245; Archer v. Duvall, 1 Fla. 219; Lathrop v. Drake, 1 Otto, 566; Claflin v. Houseman, 3 Otto, 130; Bailey v. Glover, 21 Wall. 342.

Whether any cause of action accrued prior to the order of July 3, 1874, it is not necessary to determine. Judgment will be entered overruling the demurrer to the plea of the statute of limitations.

JUDGMENT ACCORDINGLY.

LIMITATION—TRUST—FRAUD—EVIDENCE OF HANDWRITING — PHOTOGRAPHIC COPIES.

EBORN v. ZIMPLEMAN.

Supreme Court of Texas, Austin, June Term, 1877.

1. LIMITATION—TRUSTS—FRAUD.—Suit was brought in 1871 against an administrator, whose intestate, it was alleged, had executed in 1846 the following instruments, viz: "Borrowed and received from William Eborn, nine hundred dollars, which I promise to return when called for with interest. February 3d, 1846. (Signed) Thomas Eborn." "Received of William Eborn six thousand five hundred dollars, which I promise to invest in lands, or return the same when called for with interest. May 14, 1846. (Signed) Thomas Eborn." The petition alledged that the money had been received on both instruments by the obligor, with the understanding that he should go west and invest the same in lands for William Eborn, and if he failed to do so, the money should be returned with interest that soon after the last instrument was executed, the obligor left North Carolina, in which state the transaction occured, and was not heard from thereafter until 1870. The statute of limitations of four years was pleaded as a defense. *Held*,—the receipt for nine hundred dollars borrowed, to be returned "when called for," created a cause of action from its date, and against it, the statute ran from the time of its execution; (2) against the receipt for six thousand five hundred dollars, the statute began to run after the lapse of a reasonable time within which to apply the money as required, and after the lapse of said time no demand was necessary; (3) the claim was not an express trust, but must be regarded as a monied demand barred by limitation, in the absence of a sufficient ackowledgement, within four years before the institution of the suit; (4) the averment that the maker of the instruments left, soon after their execution, and that his whereabouts was not known to the holder until 1870, does not make out such a case of fraud as constitutes an exception to the statutes of limitations, there being no express charges of fraud, nor any allegation that efforts were made to ascertain his place of residence; (5) the mere removal of a debtor, without communicating to his creditor the place of his new domicil, does not constitute such a fraud as will stop the running of the statute.

2. DISTINGUISHED.—This case distinguished from Munson v. Hallowell, 26 Tex. 478.

3. EVIDENCE OF HANDWRITING.—A signature offered for the purpose of comparison can not be proved to be an original and a genuine signature, merely by the opinion of a witness that it is so, such opinion being derived solely from the witness's general knowledge of the handwriting of the person whose signature it purports to be.

4. PHOTOGRAPHIC COPIES—EVIDENCE.—Photographic copies of instruments sued on, can only be used as secondary evidence. Like letter-press copies, they are copies which may or may not be *fac-similies* of their originals. It is a question of fact as to whether a photographic copy of a writing, when offered in evidence, is a mathamatically exact reproduction of its original.

5. PHOTOGRAPHIC COPIES—EVIDENCE.—The mere fact that a witness, whose deposition is offered to establish a plea of *non est factum*, is a resident of another state, and the instrument to which the plea applies is on file in a Texas court, will not authorize the introduction in evidence of his opinion of the handwriting, based on a photographic copy of the instrument attached to the interrogatories.

6. EVIDENCE.—Though the issue on which improper evidence was admitted is immaterial, yet, if it be so intimately connected with a material issue that it can not be known whether it did not affect the finding of the jury on the material issue, to appellant's prejudice, the case will be reversed.

APPEAL from Travis County.

Shelly and *Peeler*, for appellant; *Terrell & Walker* and *Evans*, for appellee.

GOULD, J., delivered the opinion of the court:

In October, 1871, William Eborn, of North Carolina, presented to Zimpleman, the administrator of the estate of his brother, Thomas Eborn (who at the time of his death, early in 1871, was, and for many years had been, a citizen of Austin, Texas), a claim duly authenticated on the following instruments:

"Borrowed and received from William Eborn nine hundred dollars, which I promise to return, when called for, with interest.

"(Signed) THOS. EBORN.

"February 3, 1846."

"Received of William Eborn six thousand five hundred dollars, which I promise to invest in lands, or return the same, when called for, with interest.

"(Signed) THOS. EBORN.

"May 14, 1846."

The affidavit authenticating these instruments also claimed the further sum of $400, with interest thereon from April 20, 1846, for which it was stated Thomas Eborn had also given a note similar in terms to the instrument set out, but which had been lost. Zimpleman, the administrator, rejected the claim, on the ground that it was barred by the statute of limitations, and this suit was brought to have the claim established. The petition alleges that in 1846, when Thomas Eborn was desirous of removing from North Carolina to the West, the petitioner advanced him the sums of money specified in the claim, on the understanding that Thomas would invest in lands for petitioner, and, in default of doing so, return the same with interest thereon when called for, and that soon after the receipt of the last-mentioned sum the said Thomas Eborn left the State of North Carolina, and was not heard from thereafter, by any of his relatives or friends, until some time in the early part of the year 1870, when petitioner received a letter from Thomas requesting him to come to Austin, Texas. In an amended petition, besides claiming that the instruments sued on established a trust that on failure to invest in lands the money was due on demand, and demand could not be made because plaintiff did not know where his brother was until about one year before his death, it was further alleged that on the first day of January, 1871, Thomas Eborn acknowledged in writing his obligation to pay plaintiff the money, and promised to pay the same. The letter, which was offered in evidence under the last allegation, is as follows:

"AUSTIN, January 1, 1871.

"Dear Brother:—I am bad off, and want you to come to Austin City right away, and take charge. I have got property in Austin to pay you for the money you let me have, and the money Uncle Tom paid me for you. Come at once; don't put it off. Have been

looking for you some time. At my death, all I have is yours.

"(Signed) THOS. EBORN."

The original answer of the administrator set up the defense of limitations, and also contained a plea of *non est factum*, signed by the attorney for the administrator, and verified by the affidavit of one Lawrence, claiming to be the agent of the parties interested in the estate. A general exception to the plea of *non est factum* was sustained. Afterwards, one McGilbary Barrow petitioned the court to be permitted to defend the suit as a co-defendant with the administrator, representing that he was brother of the half-blood and interested in the estate as heir, and was permitted by the court to file another plea of *non est factum*, embracing also the letter of January 1, 1871, in which plea it was alleged that the instruments and letter were all in the handwriting of William Eborn. The plaintiff excepted to this action of the court, and to this last plea of *non est factum*. On the trial the court instructed the jury that the defense of limitations must prevail unless the debt had been acknowledged, and that, if they found that the letter of January 1, 1871, was not genuine, they need inquire no further. If, however, they found that letter to be genuine, they were further to pass upon the genuineness of the original instrument of 1846. The verdict of the jury was for the defendant, and they further found that the letter dated January 1, 1871, was not written and signed by Thomas Eborn.

His motion for a new trial being overruled, the plaintiff appealed, and his assignment of errors and bills of exceptions present quite a number of questions, which will be considered without reference to the order in which they have been assigned.

Argued:

1. The claim, as presented, was a moneyed demand, barred upon its face. The nine hundred dollars borrowed, to be returned "when called for," created a cause of action from its date, and against it the statute runs from that time." Cook v. Cook, 19 Tex. 436. The receipt or second instrument is like the receipt which was before the court in Mitchell v. McLemore, 9 Tex. 151. In that case the receipt was for money to be invested in paying government fees for Texas scrip placed in the party's hands for location, and it was held that after the lapse of a reasonable time the agent had failed to apply the money as required he was in default, and the statute commenced to run without demand. It was held further, that, even if a demand were necessary, the plaintiff should have made it within time to have brought his suit before the statute had interposed a bar from the time the default occurred. After the lapse of a reasonable time to invest in lands, the money became due without demand, and, even if demand were necessary, four years (the ordinary period of limitation to suits on written instruments) was long enough to allow for its being made.

Regarding Mitchell v. McLemore as a case in point, and following that case and Wingate v. Wingate (11 Tex. 430), we hold that the claim, as presented and as sued on, was not express trust, but was an ordinary moneyed demand, barred by limitation, unless there was a sufficient acknowledgment to support the action. The averments of the petition, that Thomas Eborn left soon after receiving the last sum of money named, and that his whereabouts was not known until 1870, were not sufficient to make out such a case of fraud as constitute an exception to the statute of limitations. There is no express charge of fraud,—nor is it alleged that any efforts were made to ascertain his whereabouts, nor is it shown that such efforts would have been unavailing. In the case of Munson v. Hallowell, the doctrine that the fraudulent concealment of the existence of the cause of action would prevent the running of the statute, was applied to the fraudulent removal and concealment of the subject-matter of litigation; but we are aware of no decision that the mere removal of the debtor, without communicating to his creditor his new domicil, amounts to such a fraud as will stop the statute.

The statutes of limitations of this state apply "no less to a foreign than to a domestic claim," and provide that no demand against any person who shall hereafter remove to this state shall be barred by the statute of limitations of this state, until he shall have resided in this state for the space of twelve months. P. D. Arts. 4619-20.

This is the provision which the law makes for the benefit of the creditor, in case of the removal of his debtor to this from another state, and it is reasonable to presume that no further provision was deemed necessary or intended. See Hunt v. Ellison, 32 Ala. 173, and Howell v. Hine, 15 Ala. 194. The court did not err, then, in instructing the jury that, if they found against the genuineness of the letter of January 1, 1871, they need inquire no further.

There was much and conflicting evidence as to the genuineness of this letter and the other instruments sued on, and it is claimed that the court erred in excluding evidence offered by plaintiff, and in the admission of evidence offered by defendant.

2. It appears by bill of exceptions that the plaintiff offered to submit in evidence sundry paper writings purporting to be signed by Thomas Eborn, which had been testified to by competent witnesses as being, in their opinion, in the handwriting of Thomas Eborn,—that the jury might examine and compare the writing with the papers on which the suit is based,—which evidence was, on objection, excluded. The authorities cited by appellant do not maintain the admissibility, for such a purpose, of writings established only by the opinion of witnesses, or of any writings, unless "found to be genuine," or "established by the most satisfactory evidence." Travis v. Brown, 43 Penn. St.; Lyon v. Lyman, 9 Conn. 54; Meyers v. Toscan, 3 N. H. 47; Richardson v. Newcomb, 21 Pickering, 315.

In Commonwealth v. Eastman, 1 Cush. 217, the court say: "Nor can a paper proposed to be used as a standard, be proved to be an original and genuine signature, merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be. The evidence resulting from a comparison of the disputed signature with other proved signatures, is not regarded as evidence of the most satisfactory character, and by some most respectable tribunals is entirely rejected. In this commonwealth it is competent evidence; but the handwriting used as a standard must first be established by clear and undoubted proof; that is, either by direct evidence of the signature, or by some equivalent evidence;" citing Richardson v. Newcomb, *supra*, and Noody v. Rowell, 17 Pick. 490. Mr. Greenleaf favors the conclusion "that such papers can be offered only when no collateral issue can be raised concerning them, which (he says) is only when papers are conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his testimony." 1 Greenleaf, sec. 581. It is very clear that under these authorities the writings offered in evidence were not sufficiently established, and were properly excluded.

3. In the course of the trial the defendant introduced the depositions of sundry witnesses in the State of North Carolina, who testified that they knew the

handwriting of William Eborn, but not that of Thomas Eborn. Attached to the interrogatories were photographic copies of the instruments charged to have been executed by Thos. Eborn in 1846, and these witnesses testified to their belief that, if the copies were exact, those instruments were in the handwriting of William Eborn. This evidence was objected to but was admitted, and the question of its admissibility is fairly before us. It was in evidence by the artist who took the copies that, except as to color and size, they were exact reproductions of the originals, basing that statement, he says, upon the representations of scientific men as to the instruments with which they are taken and his own observations.

In support of the admissibility of such evidence, it is contended that the court will take judicial notice that the photographic process secures a mathematically exact reproduction of the original, and that, therefore, evidence as to the handwriting of such a copy is as satisfactory as though it referred to the original. But certainly the exactness of the photographic copy of a writing depends on the instrument and the materials used. Like a letter-press copy, it is a copy, and may be more or less imperfect. However superior to other copies, it is certainly a question of fact whether any particular photographic copy is exact or not, for "photographers do not always produce exact *fac-similes*." "As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased." Tome v. Parkersburg Branch R. R., 39 Md. 93.

Evidence as to the genuineness of a copy, however made, is in its nature less satisfactory than evidence as to the original. So it has been held that letter-press copies were not admissible as complete standards of comparison. Commonwealth v. Eastman, 1 Cush. 217; Commonwealth v. Jeffries, 7 Allen, 561. Where, however, the question is as to the genuineness of a letter which can not, after due effort, be produced, the letter-press copy may retain enough of its original character to be identified by a witness, and if so, the evidence is admissible as secondary evidence. Comm. v. Jeffries, *supra*. So in Leathers v. Salver Machine Co., 2 Woods, 682, where the originals were archives of the government and could not be produced, Judge Bradley, speaking of photographic copies which were admitted, says: "No better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and an authentication of their genuineness in the usual way by proof of handwriting." The evidence was spoken of as other secondary evidence admissible because no better could be had.

Lucco *et al.* v. U. S., 23 Howard, is another case (referred to by counsel). It would seem that here, too, the originals were public archives, which could not be produced, and this, perhaps, was the reason that photographic copies appear to have been used without objection. However that may be, the question of the admissibility of such evidence does not appear to have been either made, discussed or decided. Macy v. Barnes, 16 Gray, 163, is a case where magnified copies of genuine signatures of the defendant and of the disputed signature were submitted to the inspection of the jury. This, the court say, "is not dissimilar to the examination with a magnifying glass, and is an additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation." So far from treating photographic copies as necessarily accurate, the court in that case expressly say that their accuracy is a question of fact, "to be considered and determined by the jury." Here the enlarged photographic copies were used, it would seem, not as substitutes, but in addition to the originals. Certainly a photographic likeness of an individual may be used for the purpose of identification, when no better evidence is to be had (Udderzook v. Commonwealth, 76 Pa. 352); but it would scarcely be pretended that the testimony of a witness who had only seen the photograph would be as satisfactory as if he had known the original. Our conclusion is that photographic copies of instruments sued on can only be used as secondary evidence; that in this case no proper foundation was laid for the introduction of secondary evidence, and therefore the depositions in regard to the photographic copies were improperly admitted.

It does not appear that any effort was made to procure the leave of the court or the consent of the opposite party to use the originals, nor does it appear that it was impracticable to procure the attendance of the witnesses so that they might examine the original. The issue as to the genuineness of the writings was one made to be tried in the District Court of Travis County, where those writings were on file. It seems that there were witnesses in North Carolina, whose testimony as to the handwriting was wanted, some by the plaintiff and some by the defendant. The former procured his witnesses to visit Austin. In one instance at least the latter did the same. If there were other witnesses for defendant, whose attendance was not procured, that was the misfortune of appellee, but will not authorize the course pursued. If photographic copies of writings may be made useful as affording increased facilities for obtaining the testimony of distant witnesses as to handwriting, our opinion is that, until the legislature sees fit to authorize their use for such a purpose, under proper precautions, the courts can only allow it when better evidence is not to be had; and that the mere fact that the witness is a resident of another state and the writings are on file in a court of this state, does not present such a case. It is at least questionable whether witnesses who did not know the handwriting of Thos. Eborn should have been allowed to give their opinion that these instruments were in the handwriting of William Eborn. No authority has been cited for the admissibility of such evidence; and, in the absence of authority, it seems to us not within the rule which allows a witness who knows the handwriting of a party to declare his belief as to the genuineness of an instrument purporting to be signed by him. Evidence that William Eborn in fact wrote the instruments, would clearly be competent; but it seems to us that to make the opinion or belief of witnesses, not introduced as experts as to handwriting admissible, they should know the handwriting of the purported signer of the instrument. For this additional reason, the evidence as to the photographic copies should have been excluded.

It thus appears that improper testimony was admitted, and although that testimony was as to the genuineness of the instruments of 1846, and the case was disposed of (without passing upon that question) by finding that the letter of 1871 was not genuine, the two questions were so closely connected that we can not say that this improper testimony did not operate to the prejudice of the plaintiff. If the jury believed that William Eborn, the plaintiff, forged the original obligations, they would require but little evidence to convince them that the letter was also a forgery. As we can not say that the improper evidence did not operate to appellant's prejudice, this error entitles appellant to a reversal.

The question of the sufficiency of the plea of *non est factum*, is one on which the two members of the court who sit in this case have only been able to agree in part. We are agreed that section

195 of the Probate Law of 1870 referred to proceedings on the probate side of the court, and not to ordinary suits in the district court. We are further agreed, that, under articles 35 and 1442, P. D., the affidavit casting some suspicion on the instrument sued on, which must accompany the plea of *non est factum* of an administrator, may be made by the agent or attorney of the administrator. In a case where the genuineness of a note is questioned by the heirs, and where, as appears from the evidence to be the fact in this case, the administrator believes it genuine, and, therefore, it may be inferred, declines to make an affidavit casting suspicion upon it, he might still be willing that the question should be investigated, and to allow the heir to make such affidavit as would raise the issue. If it appears affirmatively that the affidavit was made with the assent of the administrator or his agent, we think the plea would have been sufficiently verified. If, however, the administrator does not assent, it would not seem to us that the heir could come into that suit as a co-defendant and take the conduct of its defense out of the hands of the administrator. As the case is to be reversed on other grounds, it is not necessary to decide whether, looking on the entire record, there was or was not error in the admission of the plea of *non est factum*.

The judgment is reversed and the case remanded.

UTTERING FORGED PAPER—REQUISITES OF INDICTMENT.

WATSON v. THE STATE.

Supreme Court of Missouri, April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

1. UTTERING FORGED PAPER—INDICTMENT UNDER MISSOURI STATUTE.—An indictment under section 21, p. 471, 1 Wag. Stat., which fails to use any of the words *pass, utter, or publish*, but uses the words "sell, exchange and deliver," is good if the acts charged constitute a passing of a forged instrument; *and where the indictment charges that the defendant* did *"sell, exchange and deliver,"* the forged paper, and the *acts* charged show affirmatively that he *did not* do so, yet he may be convicted of *passing* it, although the indictment does not charge that he did so.

2. SAME.—It is not necessary to charge the crime in the *descriptive words of the statute, nor in equivalent*, nor in *interchangeable or convertible terms*, but it is sufficient if words be used which, in connection with the acts charged, in common parlance constitute the crime imputed by the words used in the statute to define the offense.

Defendant's counsel made the following points, and cited numerous authorities: 1. The offense attempted to be charged in the indictment was at common law a cheat, and is not felony except by statute. An indictment for a statutory offense must substantially follow the statute, and defining or descriptive words in the statute must be used. This indictment must be drawn under sec. 9, p. 468, or under sec. 21, p. 471, 1 Wag. Stat. It is fatally defective under sec. 9, because it fails to charge that defendant did sell, exchange, or deliver the forged paper "with intent to have the same altered or passed," which *intent* is the very *gist* of the offense. Section 9 is a statute against *dealing* in counterfeit paper, and the formulas, "with intent to defraud," and "as true," are purposely omitted from that section; because, under that section the crime is one of which *all parties to the transfer* are equally guilty. 2. The indictment is fatally defective under sec. 21, because it fails to allege that defendant "passed," "uttered," or "published" *as true* the forged paper, and there can be no crime under that section without a passing, uttering, or publishing as true. If the charge in the indictment, that defendant did sell, exchange and deliver the forged paper, *is true*, then it is *legally* impossible that there could be any passing, uttering, or publishing, within the meaning of sec. 21. An indictment which charges a sale, exchange and delivery, for any consideration, in the defining words of section 9, and also charges that it was done "as true," and "with intent to defraud" *the receiver* of the forged paper, in the defining words of sec. 21, cuts its own throat, and is legally *felo de se*, because it is *legally* impossible that the *same transfer* of a forged instrument can constitute *both* of the crimes denounced by sections 9 and 21. 3. The indictment utterly fails to charge any offense known to the laws of Missouri, and the defendant is now imprisoned for some supposed crime *for which he never was indicted at all*.

HENRY, J., delivered the opinion of the court:

In the Iron Circuit Court an indictment was found against defendant, of which the following is a copy: "The grand jurors, etc., present, that one D. A. Watson, late, etc., on the 16th day of February, A. D. 1876, at the county, etc., did falsely, fraudulently and feloniously sell, exchange and deliver, for the consideration of $550, to the 'Ironton Manufacturing Company,' as true, a certain falsely made and forged draft, purporting to be made and issued by the First National Bank of Macomb, in the State of Illinois, a bank duly incorporated under the laws of the United States, and purporting to be drawn on the American Exchange National Bank of New York, which said last-mentioned falsely made and forged draft is as follows (copying the draft), with the intent to defraud the said 'Ironton Manufacturing Company,' and that the said D. A. Watson, at the said time he so sold, exchanged and delivered the said last-mentioned falsely made and forged draft as aforesaid, then and there, to wit: on the said 16th day of February, A. D. 1876, well knowing the same to be falsely made and forged, contrary," etc.

Defendant was tried, convicted, and sentenced to the penitentiary for a term of eight years, and the cause is here on writ of error, and the only question is as to the sufficiency of the indictment.

Section 21, 471 Wagner's Statutes, provides that "every person who, with intent to defraud, shall pass, utter or publish, or offer or attempt to pass, utter or publish as true, any forged, counterfeited or falsely uttered instrument of writing, or any counterfeit or any imitation of any gold or silver coin, the altering, forging or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument, writing or coin to be altered, forged or counterfeited, shall, upon conviction, be adjudged guilty of forgery in the same degree as hereinbefore declared for the forging, altering or counterfeiting the instrument, writing or coin, so passed, uttered or published, or offered or attempted to be passed, uttered or published."

By the 8th section, 468, the counterfeiting, forging or altering such an instrument as that described in the foregoing indictment is made forgery in the second degree, the punishment for which, by section 29, 472, is imprisonment in the penitentiary not less than five nor more than ten years. If the indictment is good under section 21, it is unnecessary to notice the other points made in the brief of defendant's counsel.

It will be observed that it contains every material allegation required by that section, but, instead of the words "pass," "utter," and "publish," substitutes the words "sell," "exchange," and "deliver." Do these words, in connection with the acts charged, suffi-

ciently describe the offense? Or, is the pleader confined to the words in the section? It is generally—not, however, invariably—sufficient to describe the offense in the words of the statute, but it does not follow that other words may not be substituted. Selling, exchanging, or delivering a bank-bill or piece of money is, in common parlance, passing the bill or money; "the plain, or ordinary and usual sense" of the word "pass," as applied to coin or bank-notes, is to deliver in exchange for something else, and is equally well expressed by the word "sell," "exchange," or "deliver."

The judgment will be affirmed. The other judges concur.

On motion for a rehearing:

HENRY, J., delivered the opinion of the court:

Section 9, Wagner's Statutes, 468, provides for a case in which both the buyer and seller of counterfeit bank-notes or coin know that they are counterfeit, and are equally guilty, and the words used descriptive of the offense are "sell," "exchange," or "deliver," and "receive," upon a sale, exchange, or delivery. Section 21, page 471, contemplates a case where one party only is guilty, and the other is victimized by him. The words descriptive of this offense are "pass," "utter," or "publish."

The defendant's counsel contends that the indictment under the latter section must use one of the words, "pass," "utter," or "publish," and that the offense can not be charged in any other language. In the case at bar, every averment required by that section is made, and the specific acts charged, when proven, unquestionably make out a case under that section, for they clearly constitute a passing, publishing and uttering. Is that sufficient?

The counsel confidently relies upon Van Valkenburg v. The State of Ohio, 11 Ohio, 404; Sherman Hutchins v. The State of Ohio, 13 Ohio, 198, and the United States v. Nelson, 1 Abb. U. S. Rep. 135. The case in 11 Ohio decides that proof of uttering and publishing counterfeit bank-notes as true and genuine will not sustain an indictment for selling or bartering such notes. In the criminal code of Ohio, there were two sections similar, almost identical with our sections 9 and 21, and, undoubtedly, the court properly decided the case of Van Valkenburg v. The State. The indictment charged one offense, and the evidence proved another and different offense, defined in another section of the statute. The case in 13 Ohio reaffirms the case of Van Valkenburg v. The State of Ohio. It may be remarked that in the latter case Birchard, J., dissented, and in a very able argument contended that the offense proven being of a lower grade than, and embraced in, that charged, the defendant could be convicted under that indictment for the less offense. In the case of the United States v. Nelson, the defendant was indicted for *passing, uttering* and *publishing* a counterfeit United States fractional note, with intent to defraud the United States, and was convicted. The proof was, that a person employed by the government officials, as a detective for the purpose, applied to Nelson for counterfeit money, to be, by the detective, put in circulation. He sold to the detective $410 of spurious United States notes, for which he received, in good money and a promissory note, $133. When the testimony was offered, it was objected that, on a charge for passing, proof of selling was inadmissible, but the objection was overruled, and that ruling formed the basis of a motion for a new trial. The Act of Congress of June, 1864, defines the offense to be to utter, pass, publish or sell counterfeit United States notes, knowing them to be such, with intent to deceive or defraud. The indictment did not charge that defendant sold the notes. The court said: "The single question, which I find it necessary to determine, is whether, under the statute last referred to, any delivery of a spurious note to another for value, for the object or purpose of being passed or put into circulation, as and for money, is a passing within the meaning of the Act of Congress;" and he determines the question in the affirmative. There, it will be observed, the defendant was charged with passing, uttering and publishing, and the proof was that the defendant *sold* to one who knew the notes to be counterfeit.

In the case of The State v. Mitchell, 1 Baldwin, Mr. Justice Baldwin says: "The note is uttered when it is delivered for the purpose of being passed; when put off it is passed. In the case at bar the indictment does not use the word "pass," but alleges acts done by defendant which constitute a passing, and employs words which, in their common acceptation, mean the same thing, and even technically are in some respects convertible terms. And when, in addition to the employment of those words, it alleges acts done, which clearly constitute a passing of the forged draft, there can be no doubt of the sufficiency of the indictment; and, with due deference to the able counsel, we think that the cases in 11 and 13 Ohio are not applicable to the question involved in this discussion, and that the case of the United States v. Nelson supports the conclusion we have reached. We do not mean to say that the words "pass," "utter" and "publish," and the words "sell," "exchange" and "deliver," may be used interchangeably, but that, where the latter words are used in connection with acts charged, which clearly constitute the offense imputed by the former words, the indictment is sufficient.

In support of these views we refer to United States v. Batchelder, 2 Gallison C. C. 15; State v. Little, 1 Vt. 331; State v. Wilkin, 17 Vt. 155; Peck v. State, 2 Humph. (Tenn.) 78; State v. Smith, 5 La. Ann. 340; State v. Bullock, 13 Ala. 410; State v. Pennington, 3 Head, 119.

Motion for rehearing overruled. All concur.

NOTE BY THE REPORTER.—I send the full text of this rather remarkable decision in place of the usual abstract, because it is very clear that the members of the profession who attend to criminal business must at once either prepare themselves for the task of having the case promptly overruled, or else make up their minds to abandon any preconceived notions they may have entertained that there is any difference between a "good" indictment and a "bad" indictment. Manifestly, the principle maintained by the court in the two opinions given in this case, is that *a statutory crime need not be charged in the language of the statute at all, nor even in equivalent or interchangeable words;* but it is sufficient if words are used which, *in common parlance,* in connection with *the acts charged,* constitute the crime defined by the statute. This is the logic of the whole of the two opinions. This, strange as it may appear, *is the law,* because our supreme court so declare it. Under this ruling, I submit that the following form of indictment would be good under either section (9 or 21): "The grand jurors, etc., present that John Smith, etc., at the county of etc., feloniously shoved the queer, to the tune of a double eagle, upon Bob Jones, by inducing that popular grocer to take two bogus spielmarks for four sacks of flour, contrary to the statute," etc., etc. For, "shoving the queer" is in common parlance "passing, uttering and publishing" counterfeit money, and the "act charged" shows that defendant "passed" brass pieces for current coin. So an indictment for murder need not use the words "wilfully, deliberately and premeditatedly;" an indictment for rape need not use the the words "forcibly ravishing;" an indictment for robbery need not use the words "by putting him in fear of some immediate injury to his person." [I once saw a prosecuting attorney *fined* because his indictment for robbery, alleged that defendants "jayhawked" the injured person;—but that day has passed—"jayhawk" in common parlance *means* to rob.] In short, none of the statutory definitions of crime, upon the use of which in the indictment, our courts have alway insisted, need be any more used.

The authorities cited by the court to sustain the opinions given are as follows:—U. S. v. Batchelder, 2 Gall. C. C. 15; and the language relied upon is as follows: "It is not necessary, in an indictment for a statutable offense, to follow the exact wording of the statute. It is sufficient if the offense be set forth with substantial accuracy and certainty to a reasonable intendment." Now in The State v. Ross, 25 Mo. 426, this *very language is quoted* by Ryland, J., and after it he immediately adds, "yet words *which enter into the description of the offense* and constitute the *specific* offense, can not be dispensed with. When they are descriptive of the offense, *they must be used*. The law in such cases allows *no substitute*, because no other words are exactly descriptive of the offense." In U. S. v. Batchelder the indictment said "did *violently* abduct," and the language of the statute was "*forcibly* abduct." Why should the court cite this authority in the case at bar? There is *no question of that kind* raised in this case. The question in that case was whether the difference between "violently" and "forcibly" would vitiate the indictment; the question here is, whether the words "sell, exchange and deliver," words "which enter into the description of the offense and constitute the specific offense," in the 9th section, can be substituted for "pass, utter and publish," the words used in section 21, to define another and different crime. For the *specific character* of the crime denounced in section 9, and the *difference* between it and the crime denounced in section 21, depends wholly and only upon the difference between to sell, exchange or deliver, with intent to have uttered or passed, and to *pass, utter or publish as true*; "the act charged" may be the same, *or the single act of the transfer of a counterfeit;* and whether *that act* "constitutes the specific offense" described in section 9, or constitutes that described in section 21, depends solely upon whether *the transfer* was a sale, exchange or delivery, with intent to have the instrument uttered or passed, or a passing, uttering or publishing as true. What possible bearing can U. S. v. Batchelder have upon the question in the case at bar?

The court also cites The State v. Little, 1 Vt. 331, where the words of the statute were, "the remains of any dead person," and the words of the indictment were, "the dead body of B. P." Also, The State v. Wilkins, 17 Vt. 155, where the indictment said, "a counterfeit bank note," and the statute was, "a counterfeit bank bill or promissory note"; also, Peck v. The State, 2 Hump. 78, where the statute said, "coin in *imitation* of the coin current," and the indictment said, "the likeness and similtude of coin current"; and also, The State v. Smith, 5 La. An. 340, in which the indictment said, "break and enter into a *store*," and the statute was, "break and enter into a *shop*," etc; also, State v. Bullock, 13 Ala. 410, where the statute said, "assault *with an attempt* to murder," and the indictment was, "assault *with intent* to murder"; and also, The State v. Pennington, where the statute was, "wilfully and maliciously," and the indictment said, "unlawfully, maliciously and wantonly."

Now the doctrine of "*certainty to a reasonable intendment*" (and this expression once had a definite, *legal* significance) might reasonably be applied to all of the cases cited by the court; but it is difficult to hazard even a conjecture as to how *any* of the cases cited by the court could be considered to be *authority* for the opinions rendered in the case at bar. They raise questions as to whether an abduction which is "violently" done is not necessarily "forcibly" done; whether "bank bills and promissory notes," do not necessarily include "bank notes," *i. e.* "promissory notes" made by a bank; whether a "likeness and similitude" of coin is not necessarily an "imitation" of coin; and to all of these cases the doctrine of "certainty to reasonable intendment" in the construction of criminal statutes applies; but they do not raise any question whether an indictment which *fails* to charge that the sale, exchange or delivery of counterfeit paper was made "with intent to have the same uttered or passed," is good under section 9, nor whether an indictment which *fails* to charge any passing, uttering or publishing, is good under section 21; nor do they even intimate that an indictment is good which uses words that "in common parlance, in connection with the act charged constitute the crime," although the act charged might have been such as to support a conviction *if it had been charged in the words of the statute.*

The *true* rule, upon which defendant's counsel insisted, and which the court announced in The State v. Ross, 25 Mo. 426, is that *where the statute creates a crime and defines it, the indictment must follow the statute, and must charge every element which enters* into the definition of the *specific offense.* This has been uniformly held by our supreme court, and the case at bar is the *first* departure from it. No Missouri case has been cited, and, I venture to assert, none can be cited, which sustains the opinion in the case at bar. Out of numerous cases the following may be cited as conclusive. The State v. Hopken, 27 Mo. 599; The State v. Bankhead, 25 Mo. 588; The State v. Ross, 25 Mo. 426; The State v. Howerton, 59 Mo. 91. The two Ohio cases cited by defendant, and commented upon by the court, decide that "proof of uttering and publishing counterfeit bank notes as true and genuine, will not sustain an indictment for selling or bartering such notes." That is to say, that proof of the offense charged in our section 21 will not sustain an indictment drawn on section 9. How then could the court reach the conclusion made in the case at bar? How did the court hold that this indictment was for passing, uttering and publishing, when it charges a sale, exchange and delivery? How could the court know that it was *intended* to be drawn under section 21? The indictment would be a good indictment under section 9, if it did not omit the words "with intent to have same uttered or passed." It charges a "sale, exchange and delivery for a consideration," as per section 9. There was no "bill of exceptions," and no evidence, there was nothing before the court at all, except the indictment itself; and there is no lawyer at the bar, who can undertake to say whether this indictment was *intended* to be drawn under section 9, or under section 21, or say for which of the *two* crimes this defendant was convicted; and if the indictment *was* (as it itself says it was) for selling, exchanging and delivering, proof of passing would not sustain the conviction.

The use which our supreme court has made of U. S. v. Nelson, 1 Abbott, 135, is, to say the least of it, a very strange one. The act of congress upon which defendant was indicted defined the offense to be, to "utter, publish or *sell* counterfeit notes," and omitted the words "as true." The federal judge did say, as quoted in the case at bar, "the single question which I find it necessary to determine is, whether, *under the statute last referred to, any* delivery of a spurious note to another for value, for the purpose or object of being passed or put into circulation, as and for money, is a passing *within the meaning of the act of Congress.*" The judge held it *was a passing* within the meaning of the act of Congress, because the statute uses the words "utter, publish or *sell*," and omits the words "as true," and defendant's counsel cited the case to show that the conviction was sustained *only* because the statute said "utter, publish or *sell*," and that the federal judge based his opinion on the use of the word "sell," and the omission of the words "as true," alone, which word does not occur in our section 21. The use our court makes of this decision is, perhaps, the neatest example of a *lucus a non lucendo* furnished by our Missouri Reports. The federal judge held that the conviction was good because the statute said utter, publish *or sell*, omitting the words as true; and any transfer, etc., was a violation of the act of Congress; *non constat*, that "any transfer," etc., is a crime under section 21, which does not use the word "sell" at all, and does not use the words "as true."

I apprehend that every lawyer who knows the meaning of the formulas, "certainty to a reasonable intendment," "certainty to an intent certain," etc., in their application to indictments for statutory offenses, will read with some degree of astonishment, the decision of a Missouri Supreme Court which substitutes for these formulas, which embody definite and well-known legal principles, the mere discretion of a judge exercised in ascertaining whether the words which the law uses to define a certain crime may not in common parlance be stricken out of the definition, and replaced by words which the statute uses to define another and different offense.

The opinion says of the indictment: "It will be observed that it contains every material allegation required by that section; but instead of the words 'pass, utter and publish' its substitutes the words 'sell, exchange and deliver.' Do these words, in connection with the acts charged, sufficiently describe the offense? Or is the pleader confined to the words in the section?" To these questions I suppose that every competent lawyer will answer in the language of Judge Ryland: "Words which enter into the description of the offense, and constitute the specific offense, *can not be dispensed with.* When they are descriptive of the offense, they *must be used.* The law in such cases *allows no substitute.*" And this answer would be sustained by the whole body of judicial authorities. If the offense is a passing,

uttering and publisning, it must be so charged; if it is a sale, exchange and delivery, for a consideration, with intent to have the same uttered or passed, it must be so charged. If there was a sale, exchange or delivery, within the meaning of section 9, it is *legally* impossible that there could be a passing, within the meaning of section 21, and *vice versa*. K.

SELECTIONS.

THE CHARGES AGAINST JUDGE DILLON.

The charges against Judge Dillon, recently made in the columns of *The Nation*, have excited a great deal of comment throughout the country, and, in this part of it, a great deal of indignation against their author. Judge Dillon's printed answers to the charges are a sufficient refutation of them, and the letters in his defense by various persons, that have been published in *The Central Law Journal*, are simply cumulative evidence of their falsity. But Judge Dillon has been more thoroughly vindicated by the derision with which these charges have been treated by the bench, bar, journals, both legal and news, and almost the whole people of the eighth judicial circuit, than he could have been by any newspaper trial or legal investigation. *The Nation* has, by its eloquent and vigorous articles on the futility of "investigating committees," shown clearly how well it realizes that, at the present day, investigations investigate in an even less ratio than "protection protects." Investigating committees and "whitewashing" committes are justly regarded as almost synonymous terms, and the acquitted party is "whitewashed" —not authoritatively pronounced innocent. No sane man can weigh the report of a committee, be it what it may, against the indignant refusal of the five millions of the people in the eighth judicial circuit to entertain, for an instant, the charges brought against Judge Dillon. Character counts for something with the people, and they are never wrong when, after a twenty years' test of a man's integrity and capacity in responsible stations, they declare, without a dissenting voice, that they know him to be honest. We speak only of the people of the eighth circuit, because he is known to them in his official and private capacity. It is seldom that any one filling a judicial station has so thoroughly gained the confidence and good will of bench, bar, and people as has Judge Dillon in his circuit. It will require "confirmation as strong as Holy Writ" to induce them to consider, even, any charges affecting his official or private integrity. Judge Dillon is not without faults. We have sometimes wished, for his own sake, he had less kindness of heart and greater ability to say NO to some of those about him. But dishonesty, in any shape, is not among his shortcomings.

These charges seem prompted by the malice of an unsuccessful litigant, with the apparent design of destroying Judge Dillon's chances for the vacant seat on the supreme bench. As is well known, he is not our choice for this place; but the reasons therefor are geographical, not personal. If ability, learning, integrity, and judicial experience were the only requirements, few are equally well fitted for the place. But to these it is necessary to add residence in some section of the country not now represented in the supreme court. It is of national concern that each section of the country be represented there. The South, as we have before said, has had no representative for seventeen years, while for the last ten she has sent to Washington for decision more cases, and those involving greater interests, than any other section. There is no room for denying that in right, justice, and, we think, expediency, the vacant seat should be assigned her. From the jurists of the South, or of the whole country, as we said in a previous number, we know of none better and few as well qualified, by reason of learning, ability, experience, and integrity, to adorn the position of associate justice of the supreme court as Chancellor Cooper of Tennessee. But if the appointee is not to be Chancellor Cooper, nor a Southerner, then we hope Judge Dillon's name may be sent in for confirmation.

It seems to us that *The Nation* has, for once, made itself ridiculous. Had it, in 1865, accused Abraham Lincoln of taking bribes, it could scarcely have put itself in a more unseemly position. That the people of the whole country do not resent these charges against Judge Dillon as those of the eighth circuit have done, is because they do not know him, and have not that property in his reputation that the people of his circuit have—a property like that the whole country had in Lincoln's fame in 1865, less only in degree; and the sooner *The Nation* acknowledges the error of the ways of its correspondent who made the charges, and declares its own disbelief in them, the sooner it will extricate itself from a position that in no way does it credit.—[*The Southern Law Review*.

BOOK NOTICES.

WILLIAMS ON EXECUTORS.—The Law of Executors and Administrators. By the Right Honorable Sir EDWARD VAUGHAN WILLIAMS, late one of the judges of the Court of Common Pleas. Seventh English Edition. Sixth American Edition, in which the subject of Wills is particularly discussed. By J. C. Perkins, LL.D. In three volumes. Philadelphia: Kay & Brother. 1877. Pages, 2760.

The profession are indebted to English judges, or to lawyers who afterwards became judges of some of the higher courts of Great Britain, for treatises upon the law of acknowledged and long established fame,—Sir Mathew Hale, Sir William Blackstone, Lord Tenterden, Mr. Justice Buller, Mr. Justice Byles, and the present work of Mr. Justice Williams. By successive editions the original work has been modified and enlarged in England so as to keep pace with the changes by statute and adjudication, which are inevitable in so interesting and important a department of the law as that which forms the subject-matter of the present volumes. It may not be out of place even in the briefest notice of the present work to glance at the life of its author. He is, so to speak, a *hereditary* lawyer and author. His father, John Williams, Esq., attained the rank of serjeant and added useful notes to the edition of Saunder's Reports. An edition of the same reports was prepared by the author of the present treatise in 1824, soon after he was called to the bar. In 1832 his work on the law of Executors appeared, and its high reputation has been steadily maintained. It was not until 1846 that the author was raised to the Bench of the Common Pleas, from which he retired on account of his feeble health in 1865. The seventh London edition, which is the one here republished, was edited by the Hon. Sir Edward V. Williams and by Walter V. Vaughan Williams, Esq., of the Inner Temple, and brought down the law in Great Britain to the year 1873. The American Edition, here presented to the public under the able and learned editorial charge of Judge Perkins, of Salem, Mass., greatly enlarges the scope and usefulness of the work, particularly by incorporating into the notes the subject of *Wills*. To accomplish this and to bring into view the American adjudications, has required the addition of another volume, and we find, on examination, that the present editor is well justified in saying of this edition, that "it would now be quite as appropriate to style the treatise a work on Wills and Administrations as to apply to it the name it now bears." The

American editor has done his work well and carefully, having, evidently, brought to it his known learning, industry and experience in preparing and editing works on the law. The profession will thank the publishers for presenting them with so valuable and handsome an edition of this standard treatise. D.

TREATISE ON CHATTEL MORTGAGES. By H. M. HERMAN, author of "The Law of Executions," etc. New York: COCKCROFT & CO., 1877, pp. 666.

This is a new work on the special topic indicated by the title, from the indefatigable author of the law of Estoppel and Executions. Every lawyer knows the wide and almost radical distinctions which the common law and the judicial decisions in this country, as well as the legislation of the several states, have made between mortgages of realty and mortgages of personalty. This well warrants, if, indeed, it does not require, separate treatment, and justifies the production of a distinct treatise on this important branch of the law. Many important questions connected with this subject are, we are sorry to say, in a perplexing state of uncertainty, so much so as to authorize the author to say that they are not only contradictory, but chaotic. The author seems to have gone with great diligence over the whole field, and to have arranged the decisions in a systematic and satisfactory manner. In the main, the book, in its statements of doctrine, has wisely kept close to the adjudicated cases, but the author has at times commented with freedom on certain lines of decisions. He well observes "that a chattel mortgage is [on principle] a mere contract of hypothecation—a mere security—and that a mortgagee's rights are no greater after condition broken until by foreclosure he has rendered his security available for the satisfaction of his debt—may be a startling innovation in the jurisprudence of many of the states, but the wisdom and enlightenment of modern jurists coincide with this view. The ancient doctrines of absolute forfeiture upon breach of condition are rapidly becoming obsolete." The overworked lawyer and judge will find this book very useful to him, as it embodies an amount of research and labor which they rarely can find time independently to bestow upon the subject. The author has very fittingly and gracefully dedicated the book to Judge Foster of the United States District Court for Kansas. D.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

June Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

DAMAGES FOR DEFECTIVE TITLE.—1. Damages from a defective title are recoverable in a suit at law upon the covenants of the deed, and are not to be set up by way of counterclaim, in an answer by the grantee to a bill by the grantor to foreclose a purchase-money mortgage on the lands conveyed. 2. One may have undoubted title to lands, whether the deeds conveying it are on record or not. Opinion by MARSTON, J.—*Smith v. Fiting.*

SPECULATIVE DAMAGES—FALSE REPRESENTATIONS.—1. Damages are not recoverable for purely speculative injuries that can not be estimated by any certain standard. So *held* where the plaintiff, on the strength of the defendant's representations, had paid a subscription to a fund to induce an Eastern manufacturing firm to settle in the town where he lived, and the firm turned out to be insolvent, and none of the expected advantages, such as increase in the population or the value of real estate, accrued. 2. But is intimated that an action might lie for the amount of the subscription, as paid upon false and fraudulent representations. Opinion by MARSTON, J.—*Fitzsimmons v. Chapman.*

INSURANCE — RECIPROCAL AGENCY.—1. An insurance broker is agent for the insured, and not the insurer. 2. Where the same person is at once agent for the insurance company and for the policy-holder, the latter is estopped from denying that he has notice of the cancellation of his policy, and is bound by the return or credit of the premium to the agent. 3. An agent of an insurance company can not revive a cancelled policy already rejected by the company, unless he has their authority to rescind or revoke their action, and that, too, in the specific case; this authority can not be presumed. Opinion by CAMPBELL, J.—*Hartford Fire Ins Co. v. Reynolds.*

INSURANCE—CONSENT TO ADDITIONAL INSURANCE.—A policy of insurance contained a clause of avoidance for additional insurance, unless the consent of the company be written on the policy. The only consent alleged was in a letter of reply written by the agent of the company to the insured, saying: "We will, of course, allow other concurrent insurance with the Allemania policy, and will also place you more insurance at same rate that we charged you before, and do it in A 1 company or companies. * * * Trusting to hear from you at your earliest convenience, we remain," etc. *Held* not to amount to a consent to any specific additional insurance, nor to meet the requirements of the policy, which became absolutely void at once upon the obtaining of the additional insurance without consent. N. Y. Cent. Ins. Co. v. Watson, 23 Mich. 486, and cases cited. Opinion by MARSTON, J.—*Allemania Fire Ins. Co. v. Hurd.*

INSURANCE—STATEMENTS OF INSURED—EVIDENCE — PLEADING — LEAVING PROPERTY VACANT AS INCREASE OF RISK.—1. The notice appended to the plea of the general issue, in a suit on an insurance policy, set forth an application in writing alleged to form part of the contract of insurance, and claimed that the insured made it a condition thereof that his answers to the questions and statements in the application, touching the value of the property, should be a true exposition of the hazard. *Held*, that as the notice referred to "the written application and answers," it was proper to exclude evidence of verbal statements as to the value of the house, made by the insured at the time of the application. 2. In answer to the question, "What is the cost value of this property?" the insured had stated "$880." The policy confined the amount payable under it to the actual cash value at the time of the fire. *Held*, that by accepting an aggregate cash valuation of all the property, the company indicated that they did not care about any separate valuation of the house, and regarded themselves as amply protected by confining the liability to the cash value at the time of the fire. People v. Jones, 24 Mich. 215; Peoria Insurance Co. v. Perkins, 16 Mich. 380. 3. The defense that the insured burned his own house must be specially averred, and the company has the burden of proof. Thurtell v. Beaumont, 1 Bing. 339; Regnier v. Louisiana State M. & F. Ins. Co., 12 La. 336; McConnell v. Delaware Ins. Co., 18 Ill. 228; Mayhew v. Phœnix Ins. Co., 23 Mich. 105. 4. An instruction denying the right to recover if the the risk was increased at any time, was properly refused as abstract in not pointing out in what respect the risk was increased; also, as not confined to the defenses pleaded, which were all properly laid before the jury. 5. Where a policy contains no condition construing the vacancy of property as an increase of

risk, a provision in it declaring that "if any change should occur affecting the title, condition or occupancy of the property, whereby the risk will be increased, the same shall be immediately made known to the company, and the policy annulled, or a corresponding increase of premium paid therefor," etc., will not justify a forfeiture or cancellation of the policy for merely leaving the premises vacant without notice. Opinion by CAMPBELL, J.—*Residence Fire Ins. Co. v. Hannawold.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

September Term, 1876.

(Filed at Ottawa, June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
Associate Justices.

INSTRUCTIONS—MUST BE BASED ON FACTS IN EVIDENCE.—It is erroneous for the lower court to give an instruction where there is no basis in the evidence preserved in the record on which to predicate it, and is, therefore, objectionable as calculated to mislead the jury. Opinion by SCHOLFIELD, J., reversing.—*Bradley v. Parks et al.*

ASSAULT—VERDICT TECHNICALLY OBJECTIONABLE.—In an action for an assault, in which defendant pleaded two pleas in justification, and the jury returned the following verdict:—"We, the jury, find the defendant guilty, and assess the damages against the defendant at $75;"—*Held*, that the verdict, although not technically correct, is sufficiently responsive to the issues in the case. Opinion by SCHOLFIELD, J.—*Hamm v. Culvey.*

POWER OF COURT OF EQUITY OVER A NEGLIGENT EXECUTOR.—A court of equity will not interfere upon a bill filed alleging that defendant "has failed to discharge his duties promptly as an executor and has by divers plausible devices excused himself from properly accounting, when he ought long since to have made final settlement of the estate," unless sufficient reason is given why the power should be taken from the probate court. Opinion by DICKEY, J.—*Heustis et al. v. Johnson et al.*

ACTION ON THE CASE—DAMAGES RESULTING FROM FALSE-SWEARING.—Where, in a suit for damages caused by the wilful "false-swearing of defendant" in a former suit, although it is not necessary for the plaintiff to allege that the defendant "committed the crime of perjury," thereby causing plaintiff damage; yet where plaintiff does so allege in his declaration, an instruction telling the jury that, unless they believe that defendant "did commit the crime of perjury," they must find for defendant, is not erroneous. Opinion by WALKER, J.—*Bell v. Seneff.*

ATTACHMENT—FAILURE TO COMPLY WITH THE STATUTE.—Where the statute requires that on an attachment writ where there is no personal service, the defendant being a non-resident, the clerk of the court where the cause is pending shall, within ten days after the publication of the first notice in the papers, as required to be made, send a copy thereof by mail addressed to defendant at his place of residence as alleged in the affidavit: *Held*, that the failure to comply with the statute in that particular is fatal, that proceeding being as necessary to confer jurisdiction on the court as the publication of the notice. The writ of attachment being a statutory remedy must be substantially complied with. Opinion by SCOTT, J., reversing.—*Thormeyer et al. v. Sisson.*

INJUNCTION—SALE OF PROPERTY UNDER DEED OF TRUST.—On an injunction to restrain the sale of real property under a deed of trust, reciting that upon default of payment of the notes, sale shall be made at the north door of the court house, which, however, before default was destroyed by fire, the sale being advertised to take place at the north door of a building not far removed from the vicinity of the old court house: *Held*, that a sale at such a place satisfies the true spirit and intent of the terms of the trust deed, and that the lower court committed an error in restraining the sale under such circumstances. Opinion by SHELDON, C. J., reversing.—*Alden et al. v. Goldie et al.*

WIDOW'S AWARD—STATUTORY BAR NOT APPLICABLE TO.—In a proceeding under the statute, by a widow to obtain her allowance of personal property, known as the "widow's award,"—*Held* (1), that the provision of the statute barring all "demands" not presented within two years from the granting of letters to the administrator, has no application to the widow's award, it not being strictly a demand against the estate; (2) that where the statute reads that "the widow * * * shall be allowed as her sole and exclusive property," etc., by an interpretation of the whole statute it was intended that the power of "allowing" the widow's award should be given to the appraisers appointed by the county court. Opinion by DICKEY, J., reversing.—*Miller v. Miller.*

SHERIFF—MONEY OBTAINED UNDER A LEVY OF EXECUTION.—On a motion by a plaintiff for a rule upon defendant, who was sheriff, requiring him to pay over to plaintiff a certain amount of money, which defendant had collected by virtue of an execution issued, but where the money had been paid over to the attorneys of plaintiff, the latter alleging, however, that the sheriff had no authority so to do,—the court say: "The attorney of record for a party in whose favor judgment is rendered, has full authority to collect the money and give acquittance therefor, either to the judgment-debtor or the sheriff. The judgment-creditor has undoubtedly the right to discharge his attorneys at any time, and revoke the authority to collect; and money paid over to such attorney after his power to receive is revoked, by any one having notice that the power is revoked, must undoubtedly be regarded as paid of his own wrong." *Held*, the act of 1874, Rev. Stat., section 123, chap. 125, providing for a remedy in case a sheriff unreasonably neglects to pay any money collected by him on execution, when demanded by a person entitled to receive it, does not apply to the case at bar, where the failure on the part of the sheriff to pay is not wilful, and the question as to whether he is liable for the money, is a fair subject of dispute. The remedy, if any here, is not under this statute, but by action at law. Opinion by DICKEY, J.—*Custer v. Kimball.*

MR. SAMUEL WARREN, D. C. L., Q. C., who recently died at his residence in London, aged seventy, "was the author of an edition of 'Blackstone,' and also of an 'Introduction to Law Studies,' 'The Duties of Attorneys and Solicitors,' and other legal works. He will, however, be best known by his connection with general literature. From an early age he was a contributor to *Blackwood*, in which he published 'The Diary of a Late Physician,' which met with great success, being generally believed to be the work of a physician in actual practice. This was followed by the well-known novel 'Ten Thousand a Year,' the plot of which turns to a great extent upon the course and result of a series of litigous proceedings. He also wrote, 'Now and Then,' 'The Lily and the Bee,' and many minor pieces."

NOTES.

WHEN the late strikes occurred, the New York & Erie Railroad was in the hands of a receiver, appointed by the State Supreme Court. One of the strikers named Donohue, was brought before Judge Donohue for contempt, in interfering with property in the hands of the court's receiver. The power of the court to punish the offense as a contempt was not seriously opposed by the prisoner's counsel; but it was urged that the prisoner did not know that the property he had meddled with was in the hands of the court's officer. In this, the learned judge said, that the defense, if founded in law, would be equally available in all cases of larceny, where the prisoner could say he did not know the property he took was that of the person charged in the indictment. As the defendant had been for sometime in jail, the court committed him for five days only.

THE *Albany Law Journal*, referring to the charges against Judge Dillon, which were circulated in the *Nation*, says: "The whole matter is an illustration of one of the difficulties necessarily incident to the judicial office. When a controversy is referred to a judge for decision, as a rule each party considers himself to be right, and he is so strongly set in his opinion that no amount of reasoning can change him. The court must of necessity disappoint one party, and sometimes disappoints all parties. Then the rules of law work harshly sometimes, and it is the unpleasant duty of the judge to enforce those rules. That suitors who are defeated should feel unpleasantly is natural, and that they should give utterance to their feelings is also natural; but that circumstance will not excuse slanderous attacks on judges through the newspapers."

THE *Albany Law Journal* says: "The otherwise excellent publication, *The Law and Equity Reporter*, has the very bad habit of giving a resume of cases without any syllabus. We notice that the last number (No. 7, vol. iv.) contains twenty-three cases, that nine of these have no syllabus, three of the nine being cases in the court of appeals of the state in which it is published. In these days of numerous reports lawyers examine such publications for the facility with which they can find points decided in advance of the regular reports. It is too much to ask that in order to determine whether the case is of any value to him he should read two or three pages of matter, when a syllabus of six or eight lines would inform him in a moment. If a case is not worth the labor of a reasonable syllabus, giving its salient points, it is not worth publishing and ought not to be published. The *practice* of publishing cases without is a very careless and shiftless one, and the sooner it is discontinued the better."

THE *Washington Law Reporter* has a habit of noticing its legal exchanges under the heading of "Recent Publications." And this is what it says of the last number of the *Monthly Jurist*: "In this number *The Jurist* publishes no less than four of our reports—three of them being opinions of the supreme court, and the fourth an opinion of our Court in General Term—and gives us credit for not one of them. It not only takes the cases themselves, but also the *syllabus*, title and sub-title of each and every one of them. Nor does it stop here; it has copied with such accurate fidelity that it has reproduced a typographical error in one of the *syllabi*, citing in 'Connecticut Life Insurance Co. v. Schæffer,' *Goodall v. Boldero* thus *Goodsall v. Bolders*, precisely as it appeared in our issue of May 28." The *Law Reporter* pays such close attention to this question of newspaper ethics that we are almost afraid to cite anything from it, lest we shall forget to give the proper credit, and thus get ourselves into trouble; but we venture to credit its columns with the following anecdote: "Mr. Harry Erskine, who succeeded Mr. Henry Dundas, afterward Lord Melville, as Lord Advocate of Scotland, happening to have a female client of the name of Tickle, defendant in an action, commenced his speech in the following humorous strain: 'Tickle, my client, the defendant, my Lord.' The auditors, amused with the oddity of the speech, were almost driven into hysterics by the Judge replying, 'Tickle her yourself Harry, you are as able to do it as I.'"

THE COMMITTEE ON PRIZES of the New York Bar Association has prescribed the following regulations: 1. The post-graduate prize (of two hundred and fifty dollars) for 1877 will be awarded to the writer of the best thesis, argument or work upon the following subject. 2. The essay must be sent to the chairman of the committee, at his office, Tribune Building, New York city, on or before the 25th day of October next, signed merely with a *nom de plume*, and accompanied with the real name of the writer in a sealed envelope. Only the envelope containing the name of the winning author will be opened; all others will either be destroyed unopened or returned with the accompanying manuscript to the author upon his request. The successful essay will be the property of the association, and all other essays, not requested to be returned, will be filed for preservation in the archives of the association. 3. The prize will be awarded at the annual meeting of the association, in Albany, on November 20, 1877, and his honor, Mr. Justice Hunt, Associate Justice of the Supreme Court of the United States, has consented to present the same, if his official duties will permit of his attendance at the time. 4. Only those can compete for this prize who are members of the bar of the State of New York, of no less than five years' standing, and the prize can only be awarded when there shall be at least five competitors. 5. Notice of the subject for the prize contest, and the rules respecting the same, shall be given to the profession by such appropriate methods as the chairman may deem best. 6. Each member of the committee shall examine the essays submitted, and designate the one, in his opinion, entitled to the prize, and the award shall be made upon a plurality vote. The essays may be sent by mail or express in turn to each member of the committee. All business of the committee may be conducted by correspondence, when that shall be the most convenient method. 7. The necessary expenses of the committee for postage, expressage, printing, etc., will be borne out of the general funds of the association. 8. The committee will meet in Albany, on Monday, November 19, 1877, the day preceding the next annual meeting of the association, at 3 o'clock P. M., at the Delevan House; and will also meet before that time upon the call of the chairman.

THE *Pall Mall Gazette* relates some curious instances of punishments which arbitrary monarchs have either meted out to or threatened against the unfortunate or refractory. Don Carlos, son of Philip II, compelled a shoemaker to eat a pair of tight boots which he had made for him. "Good" Haroun Al Raschid caused to be baked in his own oven a baker who had sold adulterated bread. But the best is told of Catherine II, who had a certain banker named Suderland who kept her funds. One morning a servant came and told Mr. Suderland that the house was surrounded with soldiers, and that an officer of police desired to speak to him. The officer, whose name was Reliew, next entered and informed the banker that their "most gracious" Sovereign had charged him to execute an order the severity of which positively freightened him. He then tried to break the news gently, allowing the agitated banker to put one question after another. "Is it Siberia?" Suderland at last faltered. "Alas! one returns from Siberia," answered Reliew. "Prison?" "One comes out of prison." "Good God! I am not to be knouted?" "The knout is terrible, but does not kill." (He should have said, "but does not always kill.") "Is my life, then, in peril?" almost sobbed the banker; "the Empress so good, so clement—but let me know the worst." "Well, my dear friend," quoth the officer in a doleful voice, "my most gracious Sovereign has commanded me to have you stuffed." The unhappy part of the affair was that Reliew, though a kind-hearted man, would not admit that he had mistaken the Czarina's injunctions, which, moreover, he had evidently no intention of disobeying. In vain the banker expostulated, implored, protested. Reliew was sure there was no error. He had indeed, he said, ventured to say to her Majesty that the command was a strange one, and had made appeal to her well-known clemency, but she had cut short his first sentence with the remark, impatiently uttered, that his duty was to obey orders and not to comment on them. At length, however, Reliew, so far overcame his own fears as to agree to carry a note to the Empress. Even as he went, his heart failed him, and he repaired at once to the house of Count Bruce, who, on hearing the story, thought the officer of police must be mad. Hastening to the palace, Count Bruce demanded and obtained an audience of the Empress; and it need hardly be added that then at length the mystery was solved. Her Majesty had just lost a beautiful dog, the gift of the banker, and called after him "Suderland." Of course it was the dead favorite and not his quondam master that was to be stuffed.